DOCUMENT RESUME

ED 436 019 EA 030 099

AUTHOR Russo, Charles J., Ed.
TITLE The Yearbook of Education Law, 1999.
INSTITUTION Education Law Association, Dayton, OH.
ISBN ISBN-1-56534-099-X
PUB DATE 1999-00-00
NOTE 534p.
AVAILABLE FROM Education Law Association, 300 College Park, Miriam Hall #818, Dayton, OH 45459-3589 ($46). Tel: 937-229-3589.
PUB TYPE Books (010) -- Collected Works - General (020)
EDRS PRICE EDRS Price MF02 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Compliance (Legal); *Educational Legislation; Elementary Secondary Education; Legal Problems; *Legal Responsibility; *School Law; School Policy; *State of the Art Reviews; Yearbooks

ABSTRACT

This yearbook describes current issues affecting education law. Its 12 chapters, each written by a specialist, cover a large variety of educational legislation. Chapter 1 focuses on employees, discrimination, constitutional rights, due process, dismissal, demotion, discipline, reduction-in-force and involuntary leaves of absence, contract disputes, tenure, and certification. The second chapter examines school governance and highlights issues in state funding; special schools and school districts, such as charter schools; powers of school-district boards; financial affairs; employment affairs; contracts; facilities; transportation; tort liability; and claims and suits against the school district. The next chapter discusses pupils and those laws relating to public school attendance, private and parochial students, sanctions for student misconduct, and desegregation. Chapter 4 looks at bargaining, constitutional issues, statutory issues, recognition and representational issues, scope of bargaining, grievability and arbitratility, and judicial review of arbitration awards. The fifth chapter concentrates on students with disabilities, entitlement to services, dispute resolution, and placement, whereas chapter 6 explains torts and related issues. Legal issues in sports and higher education, as affected by federal and state legislation, are detailed in the next four chapters. The last two chapters examine education-related concerns and international law. An appendix features a table of cases and other information. (Contains an index.) (RJM)

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THE YEARBOOK
OF
EDUCATION LAW
1999

Edited by

CHARLES J. RUSSO

UNIVERSITY OF DAYTON

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DAYTON, OHIO

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Phone: 937-229-3589
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Library of Congress Catalog Card Number: 52-2403

ISBN 1-56534-099-X

PRINTED IN U.S.A.

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Introduction

Almost one hundred and seventy cases involving K-12 education were reported last year. Although the Supreme Court did not hand down any decisions directly involving school staff in 1998, two non-education employment actions relevant to education are discussed under "Discrimination in Employment." Other earlier, important precedent-setting Supreme Court rulings from past years are cited where appropriate. Litigation that is more properly the subject of other chapters is excluded as are disputes that focus primarily on procedural matters. Consistent with the pattern in previous years, the majority of cases in this chapter examine dismissal, nonrenewal, demotion, and discipline since many of these suits addressed school compliance with district and state policies.

Discrimination in Employment

Discrimination claims can arise under state or federal statutes. Even so, the vast majority of cases in this section were litigated under federal law. The most commonly applied statute, title VII of the Civil Rights Act of 1964,[1] prohibits public and private educational institutions from discriminating on the basis of race, color, religion, sex, and/or national origin. Discrimination based on national origin and race is also forbidden by section 1981 of the Civil Rights Act of 1866.[2] The Americans with Disabilities Act (ADA)[3] applies to both public and private schools. Suits continue to be brought under section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against "otherwise qualified individuals."[4] Gender-based discrimination, including sexual harassment, is proscribed by title IX of the Educational Amendments of 1972,[5] while gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[6] Employees who are forty years of age or older are safeguarded by the Age Discrimination in Employment Act of 1973 (ADEA).[7] Discrimination claims can also be pursued under section 1983 of the Civil Rights Act of 1871 which protects federal constitutional and statutory rights.[8] More recently, litigation has emerged under the Family Medical Leave Act (FMLA).[9]

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[1] 42 U.S.C. §§ 2000 et seq.
[2] 42 U.S.C. § 1981.
[3] 42 U.S.C. §§ 12101 et seq.
[4] 29 U.S.C. § 794.
[5] 20 U.S.C. §§ 1681 et seq.
[6] 29 U.S.C. § 206(d)(1).
[7] 29 U.S.C. §§ 621 et seq.
[8] 42 U.S.C.§ 1983.
[9] 29 U.S.C.§§ 2611 et seq.

The Supreme Court considered two non-education actions with relevance to education. In a case of first impression, *Oncale v. Sundowner Offshore Services*,[10] the Court held that title VII applied to same-sex sexual harassment. However, in its unanimous decision, the Court ruled that in order for conduct to be actionable, it must be viewed under an objective person standard as altering the conditions of a victim's employment. Further, in *Faragher v. City of Boca Raton*,[11] the Court decided that a city can be liable under agency principles for sexual harassment by a supervisor. In recognizing that the city could be vicariously liable as an employer under title VII for a supervisor's having created a sexually hostile atmosphere in the work place, the Court acknowledged that the city had an affirmative defense to liability if it promulgated an anti-harassment policy and if the aggrieved employee failed to take advantage of the preventive opportunities.

Race

In order for a complaint to survive a motion for dismissal, an aggrieved party must state a justiciable claim. The Seventh Circuit, in reversing the dismissal of a racial discrimination suit from Illinois, made two important observations regarding a complaint's adequacy.[12] The appellate panel indicated that the trial court improperly dismissed the complaint on the grounds that its twelve pages could have been reduced to six pages and because it failed to state a disparate impact claim naming the school district as a defendant.

Allegations of disparate treatment must include an appropriate comparison to persons of another race. A federal trial court in New York found that a school district's motion for summary judgment was appropriate in a constructive discharge case involving alleged race discrimination where a teacher's complaint was based on unsupported allegations and on comparisons with teachers who were not similarly situated.[13] In addition, an appellate court in Illinois affirmed that a school custodian who was suspended for thirty days without pay after improperly cleaning rooms failed to produce evidence that he was treated in a disparate manner.[14] The court asserted that a fellow custodian who received only a verbal warning had, unlike the plaintiff, not been previously suspended; thus, the two employees were not similarly situated for purposes of comparison.

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[10] 118 S. Ct. 998 (1998).

[11] 118 S. Ct. 2275 (1998).

[12] Bennett v. Schmidt, 153 F.3d 516 [129 Educ. L. Rep. 32] (7th Cir. 1998).

[13] Richardson v. Newburgh Enlarged City Sch. Dist., 984 F. Supp. 735 [123 Educ. L. Rep. 582] (S.D.N.Y. 1997).

[14] Reeise v. State Dep't of Human Rights, 693 N.E.2d 1194 [126 Educ. L. Rep. 1098] (Ill. App. Ct. 1998).

Disparate impact charges met with different results in two cases. The Supreme Court of Mississippi affirmed that a school district successfully defended its nonrenewal of six African-American teachers against a disparate impact charge under title VII.[15] The court was satisfied that even though none of the contracts of white teachers had been nonrenewed, the African-American teachers who filed suit accounted for only 4.04% of the entire pool of African-American teachers in the district.

In a case of national importance, a federal trial court ascertained that Alabama's passage of a state law mandating adoption of a nationally normed teacher certification test did not warrant modification of a consent decree.[16] The earlier decree determined that a state-developed certification test was discriminatory to African-Americans. In addition, the court that approved the consent agreement had ordered the state to develop a test that was both nondiscriminatory and psychometrically sound. However, despite the state legislature's adoption of a nationally normed test, the court ascertained that it would have been premature to consider whether the state met its obligations by adopting a national test.

Courts upheld employment decisions made by school boards where their actions were supported by nondiscriminatory reasons. In a case from Illinois, the Seventh Circuit sustained a board's action in relieving an African-American school superintendent of his duties during the balance of the last year of his contract and to nonrenew his contract.[17] Despite the superintendent's claim of racial discrimination, the board persuaded the court that its actions were nondiscriminatory. Among the justifications that the board offered to show that its reasons were nondiscriminatory, were that the superintendent withheld information about the district's financing, threatened to interfere with its financing, and threatened to interfere with teacher orders if his contract was not renewed.

In Missouri, a federal trial court decided that a school board that dismissed a probationary employee because he was the least senior individual in his job classification articulated legitimate, nondiscriminatory reasons for its action under title VII.[18] The court contended that the employee was unable to present an explanation why this reason was a pretext for racial discrimination.

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[15] Burks v. Amite County Sch. Dist., 708 So. 2d 1366 [125 Educ. L. Rep. 1012] (Miss. 1998).

[16] Allen v. Alabama State Bd. of Educ., 983 F. Supp. 1084 [123 Educ. L. Rep. 154] (M.D.Ala. 1997).

[17] Crim v. Board of Educ. of Cairo Sch. Dist. No. 1, 147 F.3d 535 [127 Educ. L. Rep. 554] (7th Cir. 1998).

[18] Miles v. Board of Educ. of City of St. Louis, 989 F. Supp. 1225 [124 Educ. L. Rep. 845] (E.D. Mo. 1998).

Two plaintiffs were successful in bringing discrimination cases. A federal district court jury in Tennessee awarded a white teacher in a predominantly African-American school $137,000 in back pay and $1,000 in compensatory damages for retaliation.[19] The court believed that school officials retaliated against the teacher after she filed her claim of racial discrimination. The court noted that the building principal reassigned the teacher to teach a different elementary grade in a room next to his office, made repeated unannounced visits to her classroom, refused to permit her husband to come onto school property after school to pick her up without first signing a permission slip in his office, and failed to recommend her for tenure.

A federal trial court in Illinois found that a white teacher who was demoted by school officials in a Chicago high school where 70% of the teachers were African-American stated a cause of action under section 1981 against both the board and its individual members.[20] In denying the defendants' motion to dismiss, the court maintained that the teacher established a *prima facie* case under section 1981 since she was a member of a racial minority, the district intended to discriminate on the basis of race, and the discrimination concerned one or more of the activities enumerated in the statute.

One case found that a superintendent from Alabama was entitled to qualified immunity. In reversing the denial of the superintendent's motion for summary judgment where he was charged with racial discrimination under section 1983 and violations of equal protection, the Eleventh Circuit posited that the superintendent was entitled to qualified immunity.[21] The court considered earlier comments by the superintendent, that the district needed both male and white principals to maintain its white-black ratio, were ambiguous as applied to the plaintiff, a black female. The court observed that the comments did not manifest an intent to discriminate, a requirement under both section 1983 and equal protection.

Sex

Gender issues represented a wide range of legal problems. The Seventh Circuit addressed the question of liability under title IX. In a case from Indiana, the court concluded that a high school principal and assistant principal could not be sued individually or in their official capacities under title IX for sexual abuse by a teacher.[22] In reversing the denial of the administrators' motion for summary judgment, the court offered that only the recipient of financial aid, namely the district, could be sued in a private cause of action under title IX.

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[19] Lyons v. Memphis Bd. of Educ., 6 F. Supp.2d 734 [127 Educ. L. Rep. 873] (W.D.Tenn. 1997).

[20] Mohr v. Chicago Sch. Reform Bd. of Trustees of the Bd. of Educ. of the City of Chicago, 993 F. Supp. 1155 [125 Educ. L. Rep. 452] (N.D. Ill. 1998).

[21] Mencer v. Hammonds, 134 F.3d 1066 [123 Educ. L. Rep. 525] (11th Cir. 1998).

A federal trial court in Georgia, in a case of first impression, decreed that a title IX claim for sexual harassment is preempted by title VII.[23] The court decided that title VII is the exclusive remedy in cases involving gender discrimination in employment.

In Texas, a federal trial court was of the opinion that a single act can be sufficient to establish a policy or custom for purposes of section 1983 liability.[24] To this end, the court reflected that the school board's nonrenewal of the contracts of teachers who filed grievances for sexual harassment could form the basis for a section 1983 claim.

Gender claims can be defeated by proof that a defendant acted on nondiscriminatory reasons. The federal trial court in Kansas granted a school board's motion for summary judgment in a sexual discrimination complaint filed by a female principal.[25] The court was convinced that where the board replaced the female principal with another woman, it acted properly. In light of the board's offering proof that it dismissed the principal for her inadequate job performance, the court stated that her subjective belief that it discriminated against her was insufficient to withstand the motion for summary judgment.

Gender discrimination may require proof of intent to discriminate. In Florida, a male who unsuccessfully applied for a teaching position filed a gender discrimination suit alleging that a female principal kept two statues on her desk that were covered with derogatory sayings about men. A federal trial court was of the view that even though the applicant claimed that the statues were on the principal's desk during his job interview, this did not constitute intent to discriminate under title VII.[26] In granting the district's motion for summary judgment, the court relied on the facts that the applicant could not remember the allegedly derogatory words and the principal denied having the statues on her desk.

In a case of first impression from Nebraska, the Eighth Circuit affirmed that the statutory limit on compensatory damages for "future pecuniary loss" under title VII did not apply to an award of future pay

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[22] Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014 [122 Educ. L. Rep. 48] (7th Cir. 1997).

[23] Gibson v. Hickman, 2 F. Supp.2d 1481 [127 Educ. L. Rep. 173] (M.D. Ga. 1998).

[24] Matthews v. High Island Indep. Sch. Dist., 991 F. Supp. 840 [125 Educ. L. Rep. 44] (S.D. Tex. 1998).

[25] Didde v. Unified Sch. Dist. No. 207, Leavenworth, Kan., 12 F. Supp. 1219 [129 Educ. L. Rep. 242] (D. Kan. 1998).

[26] Longariello v. School Bd. of Monroe County, Fla., 987 F. Supp. 1440 [124 Educ. L. Rep. 134] (S.D. Fla. 1997).

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since this would have been a form of equitable relief. In stating that a nonrenewed probationary teacher had a triable gender discrimination question, the court, in disagreeing with the Sixth Circuit, pointed out that "front pay is not so much a monetary award for the salary that the employee would have received but for the discrimination, but rather the monetary equivalent of reinstatement, to be given in situations where reinstatement is impracticable or impossible."[27]

At least three additional actions dealt with sexual harassment. In a case from Virginia, the Fourth Circuit ruled that a supervisor's assignment of extra work to school psychologist as part of hostile environment harassment claim did not constitute tangible employment action sufficient to give rise to the automatic imputation of liability against the district.[28] The appellate panel followed the recent Supreme Court decision in *Farragher v. City of Boca Raton* that an employer is liable in sexual harassment only for "tangible employment action."[29]

A federal trial court in Pennsylvania permitted a female custodian's sexual harassment claim to be brought under section 1983 without being subject to title VII's two-year statute of limitations.[30] The court acknowledged that since the section 1983 claim alleged a separate equal protection violation, it was not subsumed under title VII. Consequently, the court allowed the custodian's section 1983 claim to proceed to trial even though the title VII action had been dismissed.

In a broadened interpretation of the meaning of color of state law under section 1983, a federal trial court in Colorado held that a principal could maintain a harassment action against employees of a multi-district educational support services entity.[31] In denying its motion for summary judgment, the court noted that even though the board had no supervisory control over the principal, factual issues remained regarding whether harassment occurred and whether it failed to remedy the discrimination.

The first of two cases arising under state laws occurred in New York where an appellate court affirmed a school district's denial of benefits coverage to a domestic partner even though state insurance regulations prohibited such a denial.[32] The court held that although the plaintiff sued under the state's Human Rights Law alleging marital status discrimination, the court ascertained the domestic partnership did not fit within the Law's definition of marital status.

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[27] Kramer v. Logan County Sch. Dist. No. R-1, 157 F.3d 620, 626 [129 Educ. L. Rep. 952] (8th Cir. 1998)

[28] Reinhold v. Commonwealth of Va., 151 F.3d 172 [128 Educ. L. Rep. 588] (4th Cir. 1998).

[29] 118 S. Ct. 2257, 2292-93 (1998).

[30] McLaughlin v. Rose Tree Media Sch. Dist., 1 F. Supp.2d 476 [126 Educ. L. Rep. 942] (E.D. Pa. 1998).

[31] Lopez v. San Luis Valley, Bd. of Cooperative Educ. Servs., 977 F. Supp. 1422 [122 Educ. L. Rep. 137] (D. Colo. 1997).

[32] Funderburke v. Uniondale Union Free Sch. Dist. No. 15, 676 N.Y.S.2d 199 [128 Educ. L. Rep. 817] (App. Div. 1998).

Female cafeteria employees unsuccessfully stated a claim under the Massachusetts Equal Pay Act.[33] An appellate court affirmed that the women's jobs were not comparable with those of male custodians for the purposes of the Act.

Age

Employees prevailed in the first three of this year's six age discrimination cases. In a case from Nebraska, the Eighth Circuit ascertained that a substitute teacher who was not hired for a full-time job was entitled to a trial on the issue of age discrimination.[34] In reversing a grant of summary judgment that had been entered on behalf of the school district, the court found that a factual dispute existed as to whether its alleged dissatisfaction with the substitute's purportedly out-of-date letters of recommendation and difficult-to-locate references were a pretext for age discrimination.

In New York, a federal trial court declared that a seventy-three-year-old teacher raised triable issues as to whether her forced resignation amounted to a constructive discharge under the ADEA.[35] The court believed that the teacher's evaluations, which plummeted following a change in administrators, presented an issue as to whether the principal and department chair intentionally created an intolerable work atmosphere.

According to an appellate court in New Jersey, a teacher proffered sufficient evidence of age discrimination to withstand the school system's motion for summary judgment.[36] In reversing a grant of summary judgment in favor of the district, the court determined that the plaintiff's evidence, that thirteen female teachers over the age of forty-five were denied tenure over the past three years while no male over the age of forty-five was denied tenure, was sufficient for a trial on the issue of pretext regarding the district's reasons for not granting tenure.

In Maryland, the federal trial court decreed that a teacher's assistant failed to state a cause of action pursuant to the ADEA when she was not promoted to a teaching position.[37] The court indicated that the assistant's performance evaluations were substandard and that the district hired teachers close to the assistant's age.

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[33] Jancey v. School Comm. of Everett, 695 N.E.2d 194 [126 Educ. L. Rep. 1103] (Mass. 1998).

[34] Widoe v. District # 111 Otoe County Sch., 147 F.2d 726 [127 Educ. L. Rep. 576] (8th Cir. 1998).

[35] Gruberg v. Board of Educ. of the Sewanhaka Cent. High Sch. Dist., 3 F. Supp.2d 280 [127 Educ. L. Rep. 189] (E.D.N.Y. 1998).

[36] Greenberg v. Camden County Vocational and Technical Schs., 708 A.2d 460 [125 Educ. L. Rep. 507] (N.J. Super. Ct. 1998).

[37] Phair v. Montgomery Pub. Schs., 3 F. Supp.2d 644 [127 Educ. L. Rep. 196] (D. Md. 1997).

Discrimination claims can also fail because an employment decision is not considered adverse. In such a case, a federal trial court in Alabama judged that the transfer of a white teacher who was over the age of forty from teaching eighth grade to teaching seventh grade was not an adverse employment decision for purposes of age, race, or gender discrimination.[38] The court added that even if the teacher stated a *prima facie* claim, the district offered a nondiscriminatory reason, namely the reorganization of teaching teams, as the reason for the transfer.

As illustrated by a case from Connecticut, the failure to raise a claim in a timely fashion can be fatal. The federal trial court mandated that a tenured teacher who lost her job but failed to raise her age discrimination claim in a state wrongful termination action was precluded from subsequently filing suit in a federal venue.[39] The court contended that since the claims for both the state and federal actions arose from the same set of facts, the adverse resolution of the former action was *res judicata* with regard to the latter.

Disability

A significant number of cases were litigated under federal or state disability laws. As reflected by a case from Florida, a threshold issue under ADA is whether a claimant's condition is a disability. The Eleventh Circuit affirmed that because a teacher's incontinence, which led to her dismissal, did not substantially limit her major life activity of working, it did not constitute a disability under the ADA.[40]

In a case that arose in Nevada, the Ninth Circuit decided that an educator who served in a number of teaching and nonteaching assignments related to ongoing physical and psychological problems had a triable question as to whether he was "otherwise qualified" for the purposes of section 504.[41] The court, in reversing a grant of summary judgment in favor of the school district, maintained that substantial issues of fact existed as to whether the teacher's condition was a temporary, nonchronic depression that was not covered by section 504 or a longer-term, more chronic condition, controllable by medication, that would have been covered by the statute.

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[38] Bell v. Eufaula City Bd. of Educ., 995 F. Supp. 1377 [125 Educ. L. Rep. 1177] (M.D. Ala. 1998).

[39] Sekor v. Capwell, 1 F. Supp.2d 140 [126 Educ. L. Rep. 924] (D. Conn. 1998).

[40] Swain v. Hillsborough County Sch. Bd., 146 F.3d 855 [127 Educ. L. Rep. 81] (11th Cir. 1998).

[41] Mustafa v. Clark County Sch. Dist., 157 F.3d 1169 [129 Educ. L. Rep. 990] (9th Cir. 1998).

An appellate court in Connecticut, in reversing a hearing officer's recommendation, affirmed the dismissal of a grade school teacher for moral misconduct after he was arrested and charged, but never convicted, of possessing cocaine.[42] The court concluded that even though the teacher, as a recovering cocaine addict, was an individual with a disability under section 504, his dismissal was for a reason other than being a recovering addict.

Two suits dealt with social security benefits in terms of whether the individuals had a disability. In a case of first impression from Florida, the Eleventh Circuit was of the opinion that a former school secretary's certification of total disability for social security purposes did not per se prevent her from arguing that she was a qualified individual with a disability under the ADA.[43] In reversing a grant of summary judgment in favor of the school district, the appellate panel overturned the trial court's creation of per se estoppel.

On the other hand, a federal trial court in New York sustained the discharge of a custodian with an amputated leg on the ground that he was not a qualified individual with a disability under the ADA.[44] In large part, the school district's position was strengthened by the custodian's claim that he was totally disabled for the purposes of Social Security benefits. The court observed that the custodian's claims were mutually conflicting.

As demonstrated by a case from Illinois, persons who allege claims under disability laws must be able to perform the essential functions of their jobs. The Seventh Circuit affirmed that a former teacher in a parochial school who missed most of an academic year due to extensive complications resulting from a heart condition did not have a claim under the ADA.[45] The court offered that undisputed evidence established that attendance was an essential function of the job and that the teacher missed more than four months of work. The court reasoned that the teacher was not a qualified individual with a disability under ADA because he had not requested accommodations to meet an essential job function.

A federal trial court in Florida posited that a school district was not required to accommodate a guidance counselor with a weak back who required a period of rest after driving to school in the morning.[46] The court accepted that prompt arrival was an essential element of the job inasmuch as the plaintiff was the only counselor in the school.

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[42] Gedney v. Board of Educ. of Town of Groton, 703 A.2d 804 [122 Educ. L. Rep. 1240] (Conn. Ct. App. 1997).

[43] Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214 [122 Educ. L. Rep. 419] (11th Cir. 1997).

[44] Mitchell v.Washingtonville Cent. Sch. Dist., 992 F. Supp. 395 [125 Educ. L. Rep. 52] (S.D.N.Y. 1998).

[45] Nowak v. St. Rita High Sch., 142 F.3d 999 [126 Educ. L. Rep. 109] (7th Cir. 1998).

The federal district court in Minnesota ruled that the state licensing board was not required to waive the mathematics part of a standardized licensure test as an accommodation under either the ADA or section 504 for a prospective elementary teacher who suffered from dyslexia and dysalculia. The applicant had requested a waiver of the part of the state licensure test that measures mathematics skills. The court reflected that since mathematics skills were an "essential function" of a teacher's job, "the state which publicly validates the professional's competence by awarding its license is entitled to receive an objective demonstration of competence in the particular field of endeavor."[47]

Protection under disability law may not be relevant where a person can perform job functions or adverse employment decisions are based on other factors. The Eighth Circuit affirmed that an elementary school counselor in Iowa who received treatment on several occasions for depression failed to state a claim under the ADA after she was fired from her job.[48] The court pointed out that since depression had not kept the counselor from performing most of her duties, she could not show that her disability rendered her unable to do her particular job.

A federal trial court in Pennsylvania was of the view that a school secretary, who took a leave of absence to be treated for a bipolar disorder and resigned after receiving unsatisfactory evaluations following her return to work, did not state a claim under the ADA.[49] The court was convinced that the secretary failed to produce evidence that her poor evaluations resulted from her supervisor's perception that her shortcomings were tied to her bipolar condition.

ADA claims can come into conflict with an employer's business decisions. A federal trial court in Illinois asserted that a superintendent's action in placing a custodian on paid leave and ordering him to submit to a psychiatric examination did not violate the ADA.[50] Where the custodian exhibited paranoid or agitated behavior that caused administrators to be concerned about the safety of others in the building, the court ascertained that requiring a psychiatric examination fit within the "job-related and consistent with business necessity" exception of the ADA.

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[46] Salmon v. Dade County Sch. Bd., 4 F. Supp.2d 1157 [127 Educ. L. Rep. 327] (S.D. Fla. 1998).

[47] Jacobsen v. Tillmann, 17 F. Supp.2d 1018, 1025 [129 Educ. L. Rep. 1094] (D. Minn. 1998).

[48] Olson v. Dubuque Community Sch. Dist., 137 F.3d 609 [124 Educ. L. Rep. 520] (8th Cir. 1998).

[49] Taylor v. Phoenixville Sch. Dist., 998 F. Supp. 561 [126 Educ. L. Rep. 718] (E.D. Pa. 1998).

[50] Miller v. Champaign Community Unit Sch. Dist., 983 F. Supp. 1201 [123 Educ. L. Rep. 162] (C.D. Ill. 1997).

A case from Utah illustrated how employment decisions can lead to litigation when a member of a employee's family has a disability. The Tenth Circuit affirmed the dismissal of a teacher whose twenty-one-year-old son, who suffered from bipolar affective disorder, posed a direct threat to members of the private boarding school community in which he taught.[51] The court believed that the ADA permits an employer to discipline or discharge any employee who has a relative or associate with a disability that poses a direct threat to the workplace. Conversely, a federal trial court in Pennsylvania declared that a female teacher who had not been hired to a full-time teaching position by a Catholic diocese, could proceed with her suit under the ADA and title VII where the basis for its action was her son's disability.[52] The court also permitted the teacher to maintain a claim under title VII based on discrimination against a subclass of women who had children with disabilities.

In the first of two cases involving disabilities under state law, the Supreme Court of North Dakota, interpreting the state's Human Rights Act, affirmed the dismissal of a complaint that was filed by an applicant who was hearing-impaired.[53] Even though the plaintiff had teaching experience that the successful applicant lacked, the court found that the school relied on legitimate, nondiscriminatory reasons in hiring the latter. Specifically, the court noted that the successful applicant student taught in the district.

An appellate court in Illinois affirmed a decision of the state's Human Rights Commission that an unsuccessful applicant for a position in a high school for students with behavior disorders was not discriminated against based on her disability.[54] The court acknowledged that the applicant failed to state a claim under state law because her visual impairment would have prevented her from performing a critical job function of recognizing subtle signs in the students that precede violence.

The ADA permits attorney fees to prevailing parties. The federal trial court in Colorado decided that since a school employee won reinstatement under the ADA, he was the prevailing party who was entitled to recover attorney fees in the amount of $179,000.[55]

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[51] Den Hartog v. Wasatch Academy, 129 F.3d 1076 [122 Educ. L. Rep. 401] (10th Cir. 1997).

[52] McGrenaghan v. St. Denis Sch., 979 F. Supp. 323 [122 Educ. L. Rep. 455] (E.D. Pa. 1997).

[53] Zimmerman v. Minot Pub. Sch. Dist. No. 1, 574 N.W.2d 797 [124 Educ. L. Rep. 400] (N.D. 1998).

[54] Truger v. Department of Human Rights, 688 N.E.2d 1209 [123 Educ. L. Rep. 794] (Ill. App. Ct. 1997).

[55] Carr v. Fort Morgan Sch. Dist., 4 F. Supp.2d 998 [127 Educ. L. Rep. 319] (D. Colo. 1998).

Substantive Constitutional Rights

This section discusses First Amendment constitutional rights of persons who have liberty and property interests that the government cannot treat arbitrarily or capriciously. Cases involving the state arise under the Fourteenth Amendment while those concerning the federal government are brought pursuant to the Fifth Amendment.

Speech

In order to succeed, free speech claims must be based on viable statutes. The federal trial court in Oregon decreed that a teacher's claim of discharge in violation of free speech rights could be filed under either section 1983 or a state wrongful discharge action since elements of her *prima facie* case were substantially similar for both claims.[56] The court added that if the teacher did not prevail on her section 1983 claim, then she could not recover on the wrongful discharge charge.

The singularly most important free speech in public schools is that which represents a matter of public concern. The Ninth Circuit held that a teacher from California did not have a free speech retaliation claim based on her allegedly questioning the accuracy of school attendance records because such a comment did not constitute a matter of sufficient public concern.[57] In reversing a trial court's refusal to grant a motion for qualified immunity for the board, the appellate panel held that the teacher's right to make her comments in the context of a board election were not so well established so as to deny the board's motion.

The Fifth Circuit determined that a superintendent in Texas was entitled to a grant of summary judgment in a suit challenging his reassignment of a principal to an assistant principalship.[58] The superintendent acted based on his perception that the principal leaked information to the community that her building was to be used as the site of an alternative education program for emotionally disturbed and at-risk students. The court concluded that even if information about the alternative education program constituted a matter of public concern, the principal did not have a retaliation claim under free speech because she had denied being the source of the leak.

In a case from North Carolina, the Fourth Circuit affirmed that a teacher did not have a free speech claim for retaliation when she was transferred after her students performed a play without following the school's controversial materials policy because her decision about the suitability of the play did not rise to a matter of public concern. In an expansive interpretation of *Hazelwood School District v. Kuhlmeier,*[59] the court judged that "it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges . . . ."[60]

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[56] Draper v. Astoria Sch. Dist. No. 1C, 995 F. Supp. 1122 [125 Educ. L. Rep. 1156] (D. Ore. 1998).

[57] Brewster v. Board of Educ. of the Lynwood Unified Sch. Dist., 149 F.3d 971 [128 Educ. L. Rep. 50] (9th Cir. 1998).

[58] Jones v. Collins, 132 F.3d 1048 [122 Educ. L. Rep. 1223] (5th Cir. 1998).

A federal district court in Texas granted a board's motion for summary judgment in a suit filed by a probationary teacher who claimed that her contract was not renewed in retaliation for her having complained about matters at school.[61] The court contended that complaints about work conditions and a conversation with a social worker regarding possible sexual abuse of students were not matters of public concern protected by free speech.

The federal trial court in Connecticut indicated that a teacher's complaints about the termination process used by his district over the nonrenewal of his contract did not rise to the level of a public concern.[62] The court maintained that free speech protection does not extend to matters of personal interest.

Where free speech is at issue, a plaintiff may be permitted discovery rights. A federal trial court in New York mandated that a teacher who alleged that he was fired because he advocated sex between men and boys was entitled to discovery of school district documents to ascertain the motivation for his firing.[63] In reversing a federal magistrate's statement that motivation was not an issue, the court ruled that motive was relevant to determine whether the teacher was fired for causing a potential disruption or for exercising protected free speech.

In two cases, school districts were able to enforce curriculum matters over the free speech claims of the teacher. The Eighth Circuit reversed a verdict of $500,000 on behalf of an English teacher from Missouri who lost her job in a dispute over language that students could use in class. The court was of the opinion that the board could enforce its Discipline Code prohibiting profanity against the teacher who videotaped student plays presented in class that contained repeated use of such words as

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[59] [43 Educ. L. Rep. 515] 484 U.S. 260 (1988).

[60] Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 371 [124 Educ. L. Rep. 56] (4th Cir. 1998).

[61] Carey v. Aldine Indep. Sch. Dist., 996 F. Supp. 641 [126 Educ. L. Rep. 129] (S.D. Tex. 1998).

[62] Alba v. Ansonia Bd. of Educ., 999 F. Supp. 687 [126 Educ. L. Rep. 807] (D. Conn. 1998).

[63] Melzer v. Board of Educ. of City Sch. Dist. of New York, 176 F.R.D. 71 [123 Educ. L. Rep. 209] (E.D.N.Y. 1997).

"fuck," "shit," "ass," and "bitch." The court observed that while students and teachers do not shed their constitutional rights at the schoolhouse gate, those rights "must be balanced against the society's countervailing interest in teaching students of socially appropriate behavior."[64] The court noted that permitting students to use profane language and descriptive comments about sexual encounters in front of a class "hardly promoted [society's] shared social standards."[65]

The Supreme Court of Colorado upheld a district's "controversial learning resources" policy over a teacher's free speech objections.[66] In permitting the teacher's dismissal for showing an "R" rated movie with full frontal nudity, oral sex, masturbation, profanity, cocaine abuse, and graphic violence in his logic class, the court posited that his failure to follow procedures in the school policy that required him to review the relationship of the movie to course content constituted neglect of duty.

Association

School employees prevailed in both of this year's cases dealing with freedom of association. The Eighth Circuit reasoned that a school district in Arkansas and its superintendent were liable under section 1983 for a widespread pattern of intimidating statements to prevent employees from joining a union. The court pointed out that the superintendent was liable in his individual capacity because he directly participated in a constitutional violation, regardless of whether he was an authorized policymaker. The court reiterated the well-established principle that "[t]eachers have the right to associate with the union of their choice."[67]

A federal trial court in Massachusetts found that a former elementary school teacher who alleged that her contract was not renewed due to her association with a person with whom she was living and intended to marry, stated a section 1983 claim alleging a violation of her constitutional right to intimate association.[68] However, the court added that since the constitutional right had yet to be established clearly when the teacher's contract was not renewed, school officials were entitled to qualified immunity in their individual capacities.

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[64] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[65] Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 [127 Educ. L. Rep. 568] (8th Cir. 1998).

[66] Board of Educ. of Jefferson County Sch. Dist. R-1 v. Wilder, 960 P.2d 695 [128 Educ. L. Rep. 378] (Colo. 1998).

[67] Springdale Educ. Ass'n v. Springdale Sch. Dist., 133 F.3d 649, 653 [123 Educ. L. Rep. 42] (8th Cir. 1998).

[68] LaSota v. Town of Topsfield, 979 F. Supp. 45 [122 Educ. L. Rep. 427] (D. Mass. 1997).

Religion

The Eighth Circuit affirmed a two-year award of front pay to a second-grade teacher in Missouri who gave a "magic rock" to each of her students.[69] The court was of the view that the teacher met the burden of producing evidence of religious discrimination under title VII to warrant a jury trial. At the same time, even in finding religious discrimination, both the trial and appellate courts rejected the teacher's request for reinstatement.

Privacy

One of the important areas concerning privacy involved the issue of drug testing. In a case of first impression from Tennessee, the Sixth Circuit upheld a suspicionless drug testing policy for teachers.[70] The court asserted that teachers fit within the board's definition of safety sensitive positions and that the policy had sufficient protections to determine whether the director of personnel, who was responsible for the testing, could administer a test. At the same time, the court remanded regarding alcohol testing since it was unable to determine whether the .02 threshold of alcohol in an employee's system, which was lower than the state's level for drivers, was reasonably related to the testing. Conversely, the Fifth Circuit Court struck down the drug testing policy of two school boards in Louisiana that required employees who were injured on the job to submit to drug testing.[71] According to the court, the policies were unacceptable since they lacked adequate individualized suspicion of wrongful drug use.

The Fifth Circuit affirmed the denial of injunctive relief and damages to a custodian in Louisiana who submitted to a school district's new drug testing policy.[72] After urinalysis revealed the presence of a chemical associated with marijuana, rather than attend a substance abuse program, the custodian sought an injunction to prevent his dismissal. In upholding both the random drug testing policy and the dismissal, the court stated that the drug test was minimally intrusive when compared with the district's interest in protecting students from possible access to drugs. The court added that dismissal was justified because the custodian refused to agree to the district's treatment option.

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[69] Cowan v. Strafford R-VI Sch. Dist., 140 F.3d 1153 [125 Educ. L. Rep. 613] (8th Cir. 1998).

[70] Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 [130 Educ. L. Rep. 62] (6th Cir. 1998).

[71] United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853 [126 Educ. L. Rep. 104] (5th Cir. 1998).

[72] Aubrey v. School Bd. of Lafayette, 148 F.3d 559 [127 Educ. L. Rep. 710] (5th Cir. 1998).

In Florida, a federal trial court found that a letter sent to an employee who was on an annual contract requiring him to submit to a drug test, enter a drug assistance program, or resign did not violate the employee's right to privacy.[73] The court wrote that the employee, who elected not to take the drug test and whose contract was not renewed, did not have a liberty interest at stake.

A case dealing with a newspaper's access to information had implications dealing with privacy rights. An appellate court in Pennsylvania affirmed that the state's Right to Know Act did not give a newspaper access to teacher applications.[74] The court ascertained that although applications for teaching positions might constitute public records under the Act, they contained confidential information such as home addresses, social security numbers, college transcripts, physical examination reports, and child abuse clearances that were protected from disclosure.

How school officials gain access to private information can give rise to privacy issues. A federal trial court in Illinois declared that school officials who took part in seizing the personal diary of a custodian who had a psychiatric disorder for which he was taking medication had qualified immunity for liability under the Fourteenth Amendment.[75] The court decided that since the officials received a copy of the diary that was taken by the custodian's co-workers, they were not liable for failing to discipline the other employees insofar as it was not clearly established that they had an affirmative duty to act and the right of privacy had not been sufficiently defined.

Substantive Due Process

A teacher in Wisconsin sought further review of the denial of her claim that since she was coerced into committing sexual acts with her superintendent, he violated her substantive due process liberty interest in bodily integrity.[76] In reversing a grant of summary judgment in favor of the superintendent, the Seventh Circuit held that he acted under color of state law by threatening to take adverse employment action against the teacher.

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[73] Cox v. McCraley, 993 F. Supp. 1452 [125 Educ. L. Rep. 456] (M.D. Fla. 1998).

[74] Cypress Media, Inc. v. Hazelton Area Sch. Dist., 708 A.2d 866 [125 Educ. L. Rep. 527] (Pa. Commw. Ct. 1998).

[75] Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist., 133 F.3d 1054 [123 Educ. L. Rep. 63] (7th Cir. 1998).

[76] Wudtke v. Davel, 128 F.3d 1057 [122 Educ. L. Rep. 85] (7th Cir. 1997).

Procedural Due Process

With the exception of emergency suspensions with pay, the United States Constitution mandates that procedural due process must be followed before adverse employment actions can be taken against personnel who have liberty and property interests in their jobs.[77] Although the type of due process varies depending upon the nature and severity of the anticipated consequences, its essence is notice and a fair opportunity to respond to the charges.

Liberty and Property Interests

As illustrated by a case from Mississippi, whether a property interest is present is governed by state law. Principals unsuccessfully claimed that they had a protected property interest in employment at a rate provided by a salary schedule.[78] A federal trial court contended that although the principals had a protectable right to employment, it did not extend to the salary schedule absent evidence of a board policy that stated the pay scale covered principals.

The Supreme Court of Ohio found that an administrator who served under a series of two-year contracts in the Cleveland Public Schools did not have a property interest in further two-year contracts.[79] The court indicated that since the administrator received timely notice of the nonrenewal of his contract, he had no further expectation of employment.

An appellate court in Louisiana judged that when a school district promoted a tenured teacher to a position as a guidance counselor, its subsequent attempt to return her to the classroom without a hearing deprived her of a property right.[80] The court maintained that since state law considered the return to a classroom teaching position to be a demotion, the counselor was entitled to a hearing and damages for lost wages and attorney fees.

Insofar as liberty interests are implicated when a person's reputation is at stake, the potential for stigma may require a name-clearing hearing. In a case from Illinois, the Seventh Circuit affirmed that a school board's temporary suspension of a teacher from his duties as coach and athletic director while it investigated his past criminal record did not give rise to a violation of his liberty interests.[81] The court concluded that rumors circulating about past criminal charges involving the teacher were accurate enough so as not to falsely malign his character.

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[77] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 [23 Educ. L. Rep. 473] (1985).

[78] Gardner v. Coffeeville Sch. Dist., 982 F. Supp. 1221 [123 Educ. L. Rep. 72] (N.D. Miss. 1997).

[79] State *ex rel.* McGinty v. Cleveland City Sch. Dist. Bd. of Educ., 690 N.E.2d 1273 [123 Educ. L. Rep. 1270] (Ohio 1998).

[80] Smith v. Ouachita Parish Sch. Bd., 702 So.2d 727 [122 Educ. L. Rep. 1069] (La. Ct. App. 1997).

In Oklahoma, the Tenth Circuit affirmed that a school district's failure to provide the public with an explanation of why it suspended a teacher and chose not to renew his coaching contract did not rise to the level of public stigma.[82] The court added that since coaching was not part of the teacher's primary responsibilities, he did not have due process protection in the supplemental contract for coaching

On the other hand, an appellate court in New Jersey determined that a teacher was entitled to a name-clearing hearing over the inclusion of her name on the Division of Youth and Family Services (DYFS) central registry for child abuse.[83] The court acknowledged that the DYFS's procedure for refuting charges of sexual abuse through sworn statements was inadequate under the due process clause since the teacher was not permitted to have her attorney confront and cross-examine witnesses.

Aspects of Notice

Whether a person is entitled to notice depends on the facts. The Supreme Court of Mississippi decided that since a superintendent's talking with the media about allegations of child abuse allegedly committed by an elementary principal was outside the scope of his employment, it was beyond the bounds of the state's notice provision.[84] The court noted that because the superintendent had not chosen to resolve the problem internally, he was not entitled to notice before the principal filed a defamation lawsuit against him in his individual capacity.

In New York, an appellate court observed that a bus driver was not entitled to a hearing before the school board where it accepted her constructive resignation that was called for under her union contract after she had taken more than ten consecutive days of absence without leave.[85] In positing that this was not a disciplinary action, the court was satisfied that the driver was not entitled to prior notice or a hearing and that due process could be satisfied by the grievance procedures in her contract.

As witnessed by a case before the Supreme Court of Vermont, notice can be tied to collective bargaining agreements. The court was of the opinion that a teacher's failure to comply with the grievance procedures in his collective bargaining agreement was fatal to a claim of denial of due process.[86] The court reflected that even though the school board failed to nonrenew the teacher's contract prior to the statutory date, his procedural due process rights were adequately protected by the grievance process.

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[81] Strasburger v. Board of Educ., Hardin County, 143 F.3d 351 [126 Educ. L. Rep. 577] (7th Cir. 1998).

[82] Lancaster v. Independent Sch. Dist. No. 5, 149 F.3d 1228 [128 Educ. L. Rep. 67] (10th Cir. 1998).

[83] Allegations of Sexual Abuse at East Park High Sch., 714 A.2d 339 [128 Educ. L. Rep. 302] (N.J. Super. Ct. App. Div. 1998).

[84] McGehee v. DePoyster, 708 So. 2d 77 [125 Educ. L. Rep. 246] (Miss. 1998).

[85] Barrera v. Frontier Cent. Sch. Dist., 672 N.Y.S.2d 218 [125 Educ. L. Rep. 1332] (App. Div. 1998).

Notice can also be connected to property rights. A federal trial court in Illinois stated that a principal's reassignment to another administrative position without a hearing or notice of any charges violated the principal's property interest in his contract.[87] In ruling in favor of the principal on his section 1983 claim, the court noted that the district failed to provide evidence indicating that the principal's reinstatement would harm it or its students.

State statute frequently controls notice. An appellate court in Alabama offered that the statutory provision requiring a teacher to be notified about the cancellation of a contract on or before the last day of the term meant the teacher had to receive actual notice. The court concluded that since the plaintiff had not received notice by the last day of school, she was entitled to a contract for the next year.[88]

Aspects of Hearing

Is an employer who is about to terminate or discipline an employee required to give the employee a hearing before taking any action? In a case from Tennessee, the Sixth Circuit affirmed that a pre-termination hearing prior to a school board's nonrenewal of a teacher's contract did not violate due process merely because the superintendent performed the dual role of investigator and presiding officer.[89] The court added that due process only entitled the teacher to receive written notice of the hearing, an explanation of the board's evidence, and an opportunity to be heard.

In Indiana, a middle school teacher who was accused of sexual misconduct and was suspended with pay and benefits while administrators investigated the claims, claimed that his due process right to a pre-suspension hearing was violated. A federal trial court granted a district's motion for summary judgment The court was of the view that since the teacher was suspended with pay, "predeprivation hearings are not always required because of the lessened private interest at stake."[90] Even though the suspension carried the risk of stigmatization, the court believed that the district had a significant interest in protecting its middle school children from their teacher's alledged sexual misconduct.

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[86] Rich v. Montpelier Supervisory Dist., 709 A.2d 501 [125 Educ. L. Rep. 736] (Vt. 1998).

[87] Bordelon v. Chicago Sch. Reform Bd. of Trustees, 8 F. Supp. 779 [128 Educ. L. Rep. 236] (N.D. Ill. 1998).

[88] Stills v. Alabama State Tenure Comm'n, 718 So. 2d 1145 [130 Educ. L. Rep. 361] (Ala. Civ. App. 1998).

[89] Moore v. Board of Educ. of Johnson City Schs., 134 F.3d 781 [123 Educ. L. Rep. 487] (6th Cir. 1998).

As exemplified by a case from California, the right to a hearing can implicate financial obligations. An appellate court invalidated a provision in the state Education Code that imposed half of the expenses of a hearing on professional competence on an employee who unsuccessfully challenges a suspension or dismissal. In ascertaining that the provision violated a teacher's right to procedural due process, the court asserted that, "after charges are proffered, a request for a hearing is the only avenue open to the teacher for resolving the dispute and in that hearing he or she is in the position of a defendant regardless of a procedural rule that requires the teacher to demand the right to be heard."[91]

Specific rights can be associated with hearings. An appellate court in Georgia reversed a board's nonrenewal of a middle school principal's contract on the basis that the principal was denied a fair hearing by the board's refusal to recuse its chairman.[92] The court decided that the chairman should not have taken part in the deliberations because his involvement in the allegations against the principal lead to an inference of bias.

According to the Supreme Court of Pennsylvania, a school custodian who was discharged as part of a conspiracy to purchase marijuana was entitled to reinstatement with full pay.[93] The court declared that a custodian's use of the Fifth Amendment's protection against self-incrimination during his hearing did not supplant the school district's burden of presenting independent, probative evidence of his involvement in the claimed misconduct.

Hearings require a certain process. An appellate panel in Connecticut indicated that a school board's administrative dismissal of a tenured teacher did not violate her right to due process simply because the dismissal hearing did not match the model of a trial in a court.[94] In sustaining the teacher's dismissal for incompetence and insubordination, the court held that the board was not required to afford her unlimited time for oral arguments.

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[90] Tweedall v. Fritz, 987 F. Supp. 1126, 1132 [124 Educ. L. Rep. 122] (S.D. Ind. 1997).

[91] California Teachers Ass'n v. State of Cal., 69 Cal. Rptr.2d 261, 267 [122 Educ. L. Rep. 497] (Cal. Ct. App. 1997).

[92] Johnson v. Pulaski County Bd. of Educ., 499 S.E.2d 345 [125 Educ. L. Rep. 1369] (Ga. Ct. App. 1998).

[93] Harmon v. Mifflin County Sch. Dist., 713 A.2d 620 [127 Educ. L. Rep. 916] (Pa. 1998).

[94] Halpern v.Board of Educ. of City of Bristol, 706 A.2d 1011 [124 Educ. L. Rep. 649] (Conn. Super. Ct. 1998).

The Eighth Circuit, in a case that originated in Minnesota, reversed the denial of a school district's motion for summary judgment when it discharged a principal following the discovery of evidence that she had been convicted of a felony.[95] The court contended that the principal's pretermination hearing satisfied due process since she received oral notice of the charge against her, was represented by an attorney at the meeting and had an opportunity to rebut the charge, but chose instead to admit that she had the felony on her record.

Conversely, an appellate court in Florida judged that a teacher was denied a fair hearing where the school board rejected the superintendent's recommendation that he be nominated for a professional services contract.[96] The court determined that the board's use of hearsay evidence that was not part of the evaluation process violated the teacher's right to due process.

Hearings can involve issues under open meetings statutes. In a case of first impression from Illinois, the Seventh Circuit upheld the nonrenewal of a probationary teacher's contract, even though the board meeting failed to comply with the state's Open Meetings Act.[97] The court concluded that since the teacher did not have a property interest in his job, he did not have a right to procedural due process.

One case implicated hearings and double jeopardy. An appellate court in Nebraska affirmed that a maintenance worker whose contract was terminated by the school board for physically assaulting a student was not subject to double jeopardy when he was later acquitted of criminal charges.[98] Yet, insofar as it found that the worker's claim was not totally meritless, the court refused the board's request for attorney fees.

Dismissal, Nonrenewal, Demotion, and Discipline

The cases in this section involved several ancillary issues. In the first of two disputes involving whistleblower statutes, the federal trial court in Maine decided that although a custodian in a school district established a *prima facie* claim under the state's Whistleblower Protection Act, the board was entitled to a judgment as a matter of law because it was able to articulate legitimate, nondiscriminatory reasons for firing the custodian.[99] The court noted that the custodian was unable to prove that the district's reasons for his dismissal, namely his failure to attend psychological examinations and his falsification of his employment application, were pretextual.

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[95] Coleman v. Reed, 147 F.3d 751 [127 Educ. L. Rep. 583] (8th Cir. 1998).

[96] Buckner v. School Bd. of Glades County, Fla., 718 So. 2d 862 [130 Educ. L. Rep. 355] (Fla. Dist. Ct. App. 1998).

[97] Kyle v. Morton High Sch., 144 F.3d 448 [126 Educ. L. Rep. 651] (7th Cir. 1998).

[98] Hudson v. School Dist. No.1, Lancaster County, 572 N.W.2d 379 [123 Educ. L. Rep. 337] (Neb. Ct. App. 1997).

[99] Kelii v. Portland Sch. Dep't, 988 F. Supp. 14 [124 Educ. L. Rep. 147] (D. Maine 1997).

An appellate panel in Florida reversed a jury verdict against a high school teacher for violating the state's Whistleblower's Act and title VII on the basis that the trial court judge excluded relevant evidence.[100] The court maintained that an investigator's report and a transcript of the teacher's testimony from a prior age discrimination case should have been admissible to show why the principal would have retaliated against him after he testified in the previous action dealing with the termination of his supplemental job as an attendance monitor.

In Virginia, an appellate court sustained a decision of the state's Department of Social Services to include an elementary school teacher's name on its Central Registry.[101] The court was satisfied that insofar as the teacher's inappropriate conduct constituted level I sexual abuse under the state's criminal code, his name was properly included in the Registry.

Discipline can implicate the nature of the review process. The Supreme Court of Connecticut affirmed that a former high school principal did not have to exhaust administrative remedies in her claim for constructive discharge.[102] The court reasoned that under state law, constructive discharge falls within one of the exceptions to the exhaustion of administrative remedies doctrine.

An appellate court in Texas observed that the State Commissioner of Education had the authority to reverse a school board's suspension of a teacher for failing to file the complete local record.[103] The court added that since failure to file the complete record was not a procedural irregularity, the reversal was appropriate.

Two unrelated cases concerned immunity and criminal law. The federal trial court in New Mexico found that an attorney who participated in its deliberations and encouraged a board to reprimand and later dismiss a teacher was not entitled to absolute immunity on the ground that he was actively associated with the judicial process.[104] Instead, the court offered that because the attorney's involvement constituted state action, he was potentially liable for damages under section 1983.

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[100] Costa v. School Bd. of Broward County, 701 So. 2d 414 [122 Educ. L. Rep. 542] (Fla. Dist. Ct. App. 1997).

[101] Carter v. Gordon, 502 S.E.2d 697 [128 Educ. L. Rep. 401] (Va. Ct. App. 1998).

[102] Mendillo v. Board of Educ. of Town of East Haddam, 717 A.2d 1177 [129 Educ. L. Rep. 689] (Conn. 1998).

[103] Moses v. Fort Worth Indep. Sch. Dist., 977 S.W.2d 851 [130 Educ. L. Rep. 341] (Tex. Ct. App. 1998).

[104] Cordova v. Vaughn Mun. Sch. Dist. Bd. of Educ., 3 F. Supp.2d 1216 [127 Educ. L. Rep. 226] (D.N.M. 1998).

In a criminal case from Louisiana, an appellate court upheld a three-year sentence of hard labor for a twenty-eight-year-old female teacher who was convicted of having sex with one of her fifteen-year-old students.[105] The court was satisfied that such a punishment was not excessive.

In an interesting case from New York, a school board that had charged a principal with child abuse and criminal conduct over his denial of services to special education students unsuccessfully sought to enjoin her and her attorney from distributing a redacted version of the charges to the media.[106] In affirming the denial of the board's request for a preliminary injunction, an appellate court posited that such an order would have been appropriate only to the extent that the unredacted copies disclosed the names of students and their families.

Insubordination

An appellate court in South Carolina affirmed the reversal of a school board's dismissal of a medical specialist for failing to supervise students on a field trip.[107] The court was of the opinion that the failure to supervise did not demonstrate unfitness to teach and that the specialist should have been given a reasonable time for improvement. As a footnote, the court added that since the number of supervisors who were on the field trip was nearly three times the district's minimum requirement, the amount of supervision was not at issue.

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

In upholding the dismissal of a tenured high school science teacher, the Supreme Court of Montana pointed out that the teacher was unfit for the job because he made jokes about testes and a student's menstrual periods, flipped his students off, and made gender-based remarks with sexual innuendoes in the classroom.[108] Similarly, an appellate court in New York affirmed that the dismissal of an elementary school teacher was not arbitrary or capricious in light of his behavior where he poked fourth and fifth grade female students in the back and snapped their bra straps.[109]

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[105] State v. DeGueurce, 710 So. 2d 296 [125 Educ. L. Rep. 1384] (La. Ct. App. 1998).

[106] Hendrick Hudson Cent. Sch. Dist. v. Falinski, 678 N.Y.S.2d 783 [129 Educ. L. Rep. 1138] (App. Div. 1998).

[107] Hall v. Board of Trustees of Sumter County Sch. Dist. No.2, 499 S.E.2d 216 [125 Educ. L. Rep. 1362] (S.C. Ct. App. 1998).

[108] Baldridge v. Board of Trustees, Rosebud Sch. Dist. #19, Colstrip, Mont., 951 P.2d 1343 [124 Educ. L. Rep. 424] (Mont. 1997).

[109] Forte v. Mills, 672 N.Y.S.2d 497 [126 Educ. L. Rep. 362] (App. Div. 1998).

Immorality

Employees lost all three of the cases in this section. The Supreme Court of Appeals of West Virginia upheld an administrative judge's dismissal of a teacher who admitted using marijuana at home for two years.[110] In reflecting that the admission was made during his testimony at a criminal trial for the sale of a controlled substance, the court was satisfied that even though he was acquitted based on the defense of entrapment, the teacher's admitted use of marijuana was the subject of notoriety that would have impaired his effectiveness in the classroom.

In Missouri, an appellate court affirmed the termination of a probationary teacher's contract where evidence supported the finding that he had a fourteen-year-old female at his apartment at approximately 12:25 a.m. without the permission of her parents.[111] The court was of the view that such immoral conduct rendered him unfit to serve as a teacher.

An appellate court in Michigan affirmed that a tenured teacher who was discharged after claims surfaced that he had engaged in improper sexual activity with a student sixteen years earlier was not a victim of prejudice.[112] The court wrote the dismissal was appropriate since the teacher was still employed by the public schools.

Incompetence

The courts were split on employment decisions based on incompetence. The Supreme Court of Alaska upheld the dismissal of a special education teacher who failed to implement an effective behavior management plan for her classroom.[113] The court rejected the teacher's argument that the school board was required to provide her with notice of every allegation of improper behavior management. The court was convinced that a general statement with a clarifying letter from the board's attorney was adequate.

Conversely, the Supreme Court of South Dakota ordered the reinstatement of a fourth grade teacher with back pay and attorneys' fees after the school board dismissed him due to answers he gave to student questions about homosexuality.[114] The court acknowledged that dismissal was inappropriate because the board delegated responsibility for the district's sex education program to the school nurse, who, in turn, asked the teacher to respond to the students' questions. Moreover, the court refused to permit this single incident to constitute incompetence because it was convinced that the teacher was unlikely to exercise poor judgment in a similar situation in the future.

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[110] Woo v. Putnam County Bd. of Educ., 504 S.E.2d 644 [129 Educ. L. Rep. 853] (W. Va. 1998)

[111] Hamm v. Poplar Bluff R-1 Sch. Dist., 955 S.W.2d 27 [122 Educ. L. Rep. 340] (Mo. Ct. App. 1997).

[112] Parker v. Board of Educ. of Byron Ctr. Pub. Schs., 582 N.W.2d 859 [128 Educ. L. Rep. 878] (Mich. Ct. App. 1998).

[113] Linstad v. Sitka Sch. Dist., 963 P.2d 246 [129 Educ. L. Rep. 504] (Alaska 1998).

[114] Collins v. Faith Sch. Dist. No. 46-2, 574 N.W.2d 889 [124 Educ. L. Rep. 405] (S.D. 1998).

Compliance with State Board Policies and State Statutes

Requirements for dismissal can relate to state law on employment-at-will. The Supreme Court of Iowa interpreted a statutory provision that entitles public employers to discharge employees "for just cause" to mean that the language did not limit a school board's right to dismiss a worker.[115] Rather, the court asserted that the provision was simply a restatement of the state's employment-at-will doctrine which allows employees to be dismissed for any reason that does not violate public policy.

Statutes may require exhaustion of administrative remedies before a lawsuit can be filed. An appellate court in South Carolina reversed a grant of summary judgment that had been entered on behalf of a teacher who received notice of the nonrenewal of her contract.[116] Three years after a trial court ordered the teacher's reinstatement, the appellate panel decided that the teacher could not challenge the nonrenewal of her contract without first exhausting administrative remedies.

Not all state statutes support a private cause of action. An appellate court in Colorado contended that the state's Certificated Personnel Performance Act did not create a private cause of action on behalf of a teacher who allegedly was not properly evaluated and provided with remediation.[117] In upholding dismissal of the teacher's claim, the court declared that only the Teacher Tenure Act addressed remedies relating to dismissal.

Compliance with state statutes may only have to be substantial. In a case of first impression, the Supreme Court of Arkansas affirmed that a school board only had to comply substantially with the due process requirements of the Public School Employee Fair Hearing Act.[118] By rescinding his earlier dismissal and conducting a second hearing wherein a school mechanic received notice of the charges and of his right to representation, the court was satisfied that the board's second vote to terminate his employment substantially met statutory requirements.

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[115] Lockhart v. Cedar Rapids Community Sch. Dist., 577 N.W.2d 845 [125 Educ. L. Rep. 1347] (Iowa 1998).

[116] Adamson v. Richland County Sch. Dist. One, 503 S.E.2d 752 [129 Educ. L. Rep. 512] (S.C. Ct. App. 1998).

[117] Axtell v. Park Sch. Dist. R-3, 962 P.2d 319 [128 Educ. L. Rep. 1269] (Colo. Ct. App. 1998).

[118] Small v. Cottrell, 964 S.W.2d 383 [125 Educ. L. Rep. 574] (Ark. 1998).

An appellate court in Arizona confirmed a school board's determination to offer a probationary teacher a short-term contract in compliance with the notice of nonrenewal provisions in the state's Teacher Tenure Act.[119] The court was satisfied that the statute did not require a notice of nonrenewal separate from the short-term contract. However, in reversing the dismissal of a superintendent's wrongful nonrenewal action, the Supreme Court of North Dakota ascertained that a board failed to comply with state law.[120] The court added that since the board's reasons for dismissing the superintendent, relating to ability and competence, did not provide her with specific examples or factual standards that she needed to meet, she was entitled to a trial.

Interpretations of state law can involve disagreements between administrative bodies and the courts. The Supreme Court of Appeals of West Virginia reinstated a school bus driver who was fired for smoking on his bus while transporting students.[121] The appellate panel concluded that the lower court exceeded its authority in reversing the highest administrative board after it failed to uncover convincing evidence to support the dismissal.

According to the Supreme Court of Arkansas, a principal's voluntary resignation prevented him from claiming procedural rights under the state's Teacher Fair Dismissal Act.[122] The court maintained that the principal's act of writing, "As of today, I resign," along with his signature, on a letter from the superintendent requesting his resignation satisfied the requirements for a voluntary resignation.

In Louisiana, an appellate court affirmed that a tenured teacher who was laid off after the school board canceled his industrial arts program was not entitled to the procedural protections of the state statute governing dismissal of a faculty member for cause.[123] The court rejected the teacher's claim to such protection on the basis that the teacher's termination due to cancellation of a program did not constitute dismissal for wrongful acts.

The actions of school boards can implicate issues dealing with disabilities. A cafeteria worker's refusal to accept a four hour per day part-time position with a district did not disqualify her from continuing to receive temporary total disability where three doctors released her only for three hours per day.[124] Reversing an earlier judgment in favor of the board, an appellate court in Louisiana ascertained that since the termination of disability benefits was arbitrary and capricious, the worker was entitled to attorney's fees.

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[119] Hale v. Amphitheater Sch. Dist. No. 10 of Pima County, 961 P.2d 1059 [128 Educ. L. Rep. 1232] (Ariz. Ct. App. 1998).

[120] Simmons v. New Pub. Sch. Dist. No. Eight, 574 N.W.2d 561 [124 Educ. L. Rep. 389] (N.D. 1998).

[121] Board of Educ. of County of Wood v. Johnson, 497 S.E.2d 778 [125 Educ. L. Rep. 221] (W.Va. 1997).

[122] Higginbotham v. Junction City Sch.Dist., 966 S.W.2d 877 [126 Educ. L. Rep. 521] (Ark. 1998).

[123] Nicholson v. St. John the Baptist Parish Sch. Bd., 707 So. 2d 94 [124 Educ. L. Rep. 1143] (La. Ct. App. 1998).

Wrongful actions involving employees can raise questions about reinstatement. The Supreme Court of Alabama reinstated two employees who were dismissed for violating their school board's drug policy.[125] The court reasoned that the board abused its discretion by dismissing the employees rather than reinstating them after they successfully competed a substance abuse rehabilitation program. However, in a case from New Jersey that was heard for the second time, an appellate court believed that a teacher who was wrongfully dismissed did not have to be reinstated immediately if doing so would have displaced another tenured faculty member.[126] The court decreed that the teacher, whose contract was wrongfully terminated under the state's Conscientious Employee Protection Act for complaining about inadequate ventilation, was entitled to reappointment to the next available position in his department.

Failure to follow statutory notice or evaluation provisions can result in litigation. In Ohio, failure to follow statutory evaluation requirements can lead to reinstatement of a probationary teacher. An appellate court held that school officials are not limited to information gathered during evaluation observations when choosing not to renew the contract of a probationary teacher.[127] As such, the court permitted findings by a county Department of Children's Services that the teacher in question abused children to be included in her evaluation report.

An appellate panel in Louisiana reversed decisions of both a school board and a trial court in ruling in favor of a former assistant principal who did not receive statutory notice as required by state law.[128] The court indicated that since the statutory notice provisions had not been followed, the board was obligated to negotiate a new contract with the assistant principal.

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[124] Bolton v. Grant Parish, 709 So. 2d 979 [125 Educ. L. Rep. 1379] (La. Ct. App. 1998).

[125] Jefferson County Bd. of Educ. v. Moore, 706 So. 2d 1147 [124 Educ. L. Rep. 1135] (Ala. 1997).

[126] Abbamont v. Piscataway Township Bd. of Educ., 714 A.2d 958 [128 Educ. L. Rep. 1116] (N.J. Super. Ct. 1998).

[127] Dove v. Allen County Educ. Serv. Ctr. Governing Bd., 691 N.E.2d 1127 [124 Educ. L. Rep. 670] (Ohio Ct. App. 1997).

[128] Wright v. Caldwell Parish Sch. Bd., 711 So. 2d 353 [126 Educ. L. Rep. 1133] (La. Ct. App. 1998).

Failure to provide appropriate statutory notice can be related to the nature of the remedy. An appellate court in Iowa observed that where a public school half-time teacher whose contract was not renewed did not receive the notice required under state law, she was entitled to relief as if she had been reemployed for the academic year following her nonrenewal.[129] However, the court added that the teacher was not entitled to reinstatement for any subsequent years.

Reduction-in-Force and Involuntary Leaves of Absence

Reorganization or consolidation of a school system, declining enrollment, or fiscal restraints may require a board to institute a reduction-in-force (RIF). As illustrated in the cases in this section, the sufficiency of the reasons for a RIF, which employees are to be laid off, the realignment or reassignment of staff members, and call-back rights are ordinarily governed by state tenure statutes, local board policies, and collective bargaining agreements.

Necessity for Reduction-in-Force

A federal district court in Florida granted a school board's motion for summary judgment that eliminated its vocational department and reappointed the instructor to teach art to kindergarten classes.[130] The court was satisfied that the board was able to provide the non-discriminatory reason of the decline in enrollment in response to the teacher's Age Discrimination in Employment Act claim.

Elimination of Position

An appellate court in New Jersey reversed a school board's decision to eliminate the positions of social workers on child study teams (CST) and contract out for those services.[131] The court noted that even though the board could choose not to have its own CST, it could not have one without also keeping the position of social worker.

In Alabama, an appellate court affirmed that the cancellation of a tenured faculty member's contract was justified even though the board did not follow the notice requirements in the state's Teacher Tenure Act because the reason for the elimination of her position was not known until after the end of the school year.[132] The court was of the opinion that where the board had to discontinue her job as a Chapter I administrative staff member due to budgetary problems pursuant to federal authorization and the teacher refused to respond to its offer of another administrative position, the board was justified in terminating the teacher's contract.

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[129] Rhoades v. Idaho Falls Sch. Dist. No. 91, 965 P.2d 187 [129 Educ. L. Rep. 1146] (Idaho 1998).

[130] Mize v. School Bd. of Polk County, Fla., 10 F. Supp.2d 1314 [128 Educ. L. Rep. 1064] (M.D. Fla. 1998).

[131] Vicenzino v. Bedminster Bd. of Educ., 711 A.2d 904 [126 Educ. L. Rep. 1092] (N.J. Super. Ct. 1998).

Selection of Employees

The Supreme Court of Appeals of West Virginia upheld a school board's action of eliminating some of its half-day kindergarten bus routes and replacing several part-time bus drivers on the remainder of the runs with the more senior drivers.[133] The court agreed with the board that elimination of some of the routes constituted a RIF triggering seniority requirements.

Realignment/Reassignment

An appellate court in Indiana affirmed a ruling that since a principal acquired years of seniority for the purposes of a RIF, he could bump a teacher with less seniority upon returning to the classroom when his administrative contract was terminated.[134] The court interpreted state law as permitting a principal to acquire years of service for the purposes of a RIF in the same way that a permanent teacher would have accrued seniority.

In Alabama, an appellate court reversed a school board's nonrenewal of a tenured teacher's contract even though it acted pursuant to a state law on elimination of a small program.[135] As to whether the teacher should have been offered another job, the court was of the view that the board failed to meet its burden of showing that it had not placed nontenured instructors in the same fields as the teacher it discharged.

Contract Disputes

Among the many types of problems that can arise concerning employment contracts are the inclusion of ancillary administrative, collective bargaining, and other provisions, as well as questions regarding breach of contract. In a manner similar to other legally binding agreements, an employment contract requires an offer, consideration, and acceptance.

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[132] Morse v. Alabama State Tenure Comm'n, 705 So. 2d 410 [123 Educ. L. Rep. 1319] (Ala. Civ. Ct. App. 1997).

[133] Wood County Bd. of Educ. v. Smith, 502 S.E.2d 214 [127 Educ. L. Rep. 1112] (W. Va. 1998).

[134] Caston Sch. Corp. v. Phillips, 688 N.E.2d 1315 [123 Educ. L. Rep. 332] (Ind. Ct. App. 1997).

[135] Golden v. Alabama State Tenure Comm'n, 718 So. 2d 73 [129 Educ. L. Rep. 1157] (Ala. Civ. App. 1998).

In an interesting case, the Supreme Court of Texas reasoned that a grant of summary judgment entered on behalf of a school board had the effect of conferring immunity on employees involved with the same set of facts.[136] The case concerned whether a student-athlete, whose section 1983 and state claims against the board met with summary judgment, could sue the coach who allegedly was at the heart of the lawsuit.

Two cases from California dealing with indemnification reached different results. An appellate court affirmed that an insurer was not obligated to indemnify a teacher for the $500,000 judgment against him over his acts of sexual and other forms of misconduct involving a student.[137] The court offered that state law excluded coverage for loss caused by willful acts of the insured, which here included such public acts as kissing the student on the forehead, hugging her, putting his arm around her, making suggestive jokes, and allowing her to sit on his lap. Conversely, another appellate court in California reversed a judgment that a district's insurer was not required to defend an school accountant who was charged with embezzlement.[138] The court posited that the term "insured" was broad enough to include school employees who were "acting solely within the scope of their duties."

Board Policies and Contract Stipulations

In the first of two cases dealing with compensation, an appellate court in Oklahoma affirmed that a retired superintendent was not entitled to recover a payment for accrued and unused sick leave that exceeded the amount to which other employees would have been entitled.[139] The court pointed out that a special provision in the superintendent's contract was unenforceable since it exceeded the uniform standard required by state statute for all employees.

According to an appellate court in Kansas, a teacher is not entitled to additional compensation for college credits earned after receipt of a bachelor's degree.[140] The court stated that the term, "teacher," as used in collective bargaining contracts, applied only to those persons who have obtained basic teaching certificates. The court added that credits taken after receiving a baccalaureate degree, but that are necessary for certification, do not count for purposes of advancement on the salary scale.

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[136] Newman v. Obersteller, 960 S.W.2d 621 [124 Educ. L. Rep. 466] (Tex. 1997).

[137] Barbara B. v. Horace Mann Insur. Co., 71 Cal. Rptr.2d 350 [123 Educ. L. Rep. 1231] (Cal. Ct. App. 1998).

[138] Alvarez v. Coregis Insur. Co., 74 Cal. Rptr.2d 110 [125 Educ. L. Rep. 179] (Cal. Ct. App. 1998).

[139] Adams v. Independent Sch. Dist. No. 43 of Okmulgee County, 964 P.2d 237 [129 Educ. L. Rep. 835] (Okla. Ct. App. 1998).

[140] Schmidt v. Board of Educ., U.S.D. No. 322, 951 P.2d 960 [123 Educ. L. Rep. 1296] (Kan. Ct. App. 1997).

The relationship between state constitutional limits on contracts and an employee contract was the subject of a third case. The Supreme Court of Oklahoma reversed an earlier ruling that voided a contract extension between a school district and a superintendent.[141] The court mandated that a state constitutional provision prohibiting contracts of more than one year for non-teachers was not violated where the board extended the superintendent's two-year contract at the end of his first year.

Administrative Regulations and Statutory Provisions

State statutes may limit claims based on procedural requirements. In the first of two cases from Texas, an appellate court affirmed that a dismissed teacher/coach could not file his claim under the state's Whistleblower Act insofar as he had not filed the complaint within ninety days of the alleged violation.[142] The court reflected that although the teacher sought administrative review through a grievance process, since exhaustion of administrative remedies is not a requirement for filing a lawsuit under the Act, his claim was barred by the statute of limitations.

In the second case, an appellate court affirmed the dismissal of a wrongful firing complaint filed by a former school clerk.[143] The panel acknowledged that since state law requires claims against school districts involving questions of fact to exhaust administrative remedies, the clerk's failure to do so meant that the trial court lacked jurisdiction.

Whether substitute teachers came within statutory language pertaining to minimum salaries was the subject of a case from Pennsylvania. An appellate court upheld the dismissal of a class action suit by substitute teachers which claimed that they were covered by revisions in the state Public School Code relating to compensation.[144] In reviewing the statutory language, the court determined that the provision relating to minimum salaries and increments was intended to apply only to full-time teachers.

An appellate court in Washington affirmed that the statute setting minimum salaries for public school teachers working at least 180 days per year did not apply to substitute teachers.[145] As a result, the court asserted that the law did not create a minimum per diem wage.

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[141] Brandon v. Ashworth, 955 P.2d 233 [125 Educ. L. Rep. 919] (Okla. 1998).

[142] Anders v. Weslaco Indep. Sch. Dist., 960 S.W.2d 289 [123 Educ. L. Rep. 1314] (Tex. Ct. App. 1997).

[143] Janik v. Lamar Consol. Indep. Sch. Dist., 961 S.W.2d 322 [124 Educ. L. Rep. 471] (Tex. Ct. App. 1997).

[144] McKeeta v. Duquesne Sch. Dist., 708 A.2d 1311 [125 Educ. L. Rep. 697] (Pa. Commw. Ct. 1998).

[145] Mehlhaff v. Tacoma Sch. Dist. No. 10, 966 P.2d 419 [130 Educ. L. Rep. 327] (Wash. Ct. App. 1998).

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In a case addressing the number of board members who voted in favor of a teacher's dismissal, an appellate court in Louisiana reversed an earlier judgment and ordered the issuance of a writ of mandamus reinstating the teacher.[146] The court ascertained that although a majority of the nine member board was present at the hearing, only three of the five voted to terminate the teacher's probationary contract. Relying on a fifty-one-year-old precedent from the state supreme court, the appellate panel held that a majority of the total board had to vote in favor of the discharge.

School employees met with mixed results in seeking worker's compensation. An appellate court in New York affirmed the denial of benefits for a teacher who suffered from multiple chemical sensitivity.[147] The court declared that the teacher was not entitled to benefits because he was unable to identify any extraordinary event that might have caused the accidental injury.

In Louisiana, an appellate court wrote that a teacher who was injured in an altercation with a student and who had received her salary for the entire time she was away from work was not entitled to full worker's compensation benefits.[148] The court added that the school board was entitled to offset salary paid against any disability benefits.

An appellate court in Missouri reversed an administrative board's denial of benefits to a teacher who was injured while breaking up a fight between students.[149] Despite the initial denial based on the teacher's delay in filing his claim, the court permitted the suit to proceed since it was satisfied that the late filing was caused by a delay in procuring the services of an attorney due to factors beyond the teacher's control.

In Illinois, an appellate court affirmed that a night guard at an elementary school who was attacked and injured by a stray dog incurred an injury arising out of his employment and he was entitled to worker's compensation.[150] The court observed that while no one at the school had been attacked before, others in the neighborhood had been. The court permitted recovery because insofar as the injury occurred at a location that the public did not have access to, the guard's exposure to risk was greater than that of members of the general public.

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[146] Heinick v. Jefferson Parish Sch. Bd., 701 So. 2d 1047 [122 Educ. L. Rep. 878] (La. Ct. App. 1997).

[147] Knapp v. Vestal Cent. Sch. Dist., 668 N.Y.S.2d 718 [124 Educ. L. Rep. 364] (App. Div. 1998).

[148] Evans v. Orleans Parish Sch. Bd., 703 So. 2d 201 [122 Educ. L. Rep. 1314] (La. Ct. App. 1997).

[149] Burkett v. Kansas City Missouri Sch. Bd., 955 S.W.2d 567 [122 Educ. L. Rep. 861] (Mo. Ct. App. 1997).

[150] Spingfield Sch. Dist. No. 186 v. Industrial Comm'n, 687 N.E.2d 334 [123 Educ. L. Rep. 279] (Ill. App. Ct. 1997).

An appellate court in Connecticut affirmed that a school business manager who collapsed and died shortly after delivering a lengthy speech at an arbitration hearing passed away in the course of employment.[151] Consequently, the court held that the business manager's widow was entitled to worker's compensation.

In the first of two cases dealing with disability benefits, the issue of whether a teacher who was temporarily disabled was entitled to temporary disability benefits for the summer recess and worker's compensation turned on her intentions for the summer.[152] In reversing in favor of the teacher, the Supreme Court of New Jersey remanded the case to the Division of Workers' Compensation for further factual determinations. The court suggested that if the teacher had intended to work in the summer but was prevented from doing so due to her injury, she would have been entitled to temporary disability benefits.

An appellate court in Kansas court affirmed the constitutionality of a state statute requiring an offset for prior early retirement insurance benefits against an award of permanent partial disability.[153] The court upheld the offset against the claimant's charge that the statutory provision authorizing it violated equal protection and due process.

Two cases addressed whether employees were eligible for unemployment compensation benefits during the summer. An appellate court in Illinois affirmed that two employees of a private Head Start preschool program were entitled to benefits during the summer because the program did not fit within the "educational institution" exception.[154] The court relied on the fact that the educational component of the program was incidental to social development services.

An appellate court in New York rejected the claim of a teacher's aide that he was entitled to unemployment compensation during the summer.[155] The court indicated that since the aide had a reasonable assurance of continued employment, he was ineligible for benefits.

In New York, an appellate court upheld the denial of unemployment benefits to a security guard who was dismissed because he failed to become licensed.[156] The court noted that the guard was ineligible for benefits because he contributed to his own discharge by failing to submit required documents.

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[151] Masko v. Board of Educ. of Town of Wallingford, 710 A.2d 825 [126 Educ. L. Rep. 1057] (Conn. Ct. App. 1998).

[152] Outland v. Monmouth-Ocean Educ. Serv. Comm'n, 713 A.2d 460 [127 Educ. L. Rep. 897] (N.J. 1998).

[153] Bohanan v. U.S.D. No. 260, 947 P.2d 440 [122 Educ. L. Rep. 797] (Kan. Ct. App. 1997).

[154] Community and Economic Development Ass'n of Cook County, Ill. v. Board of Rev., State Dep't of Employment Sec., 697 N.E.2d 1180 [128 Educ. L. Rep. 317] (Ill. App. Ct. 1998).

[155] Claim of Huff, 669 N.Y.S.2d 94 [124 Educ. L. Rep. 667] (App. Div. 1998).

[156] Claim of Parker, 667 N.Y.S.2d 1000 [124 Educ. L. Rep. 1007] (App. Div. 1998).

An appellate court in Pennsylvania affirmed that a teacher who was fired after he punched a student in the jaw was not entitled to unemployment compensation benefits.[157] The court was of the opinion that the teacher not only lacked good cause for hitting the student but also violated the district's corporal punishment policy.

State law can determine the length of contracts. An appellate court in Indiana posited that a principal was not entitled to automatic renewal of his one-year contract.[158] Under the state's tenure law, the court pointed out that since automatic renewal of a one-year contract is limited to one year and the principal already had a series of renewals, he was only entitled to timely notice of nonrenewal rather than an evidentiary hearing.

As illustrated by a case from New Jersey, state law may determine eligibility for sick pay. An appellate court maintained that tenured teachers who were transferred to a new district after the discontinuance of school activities in their old systems were entitled to reimbursement for unused sick time in the old district.[159] The court reasoned that the reimbursement rights transferred with the teachers and could not be bargained away under a union contract.

Two cases addressed the amount of compensation that an employee can receive under state law. The Supreme Court of Appeals of West Virginia affirmed that a speech pathologist was entitled to a one-year experience credit based on the number of days worked at two jobs.[160] The court reflected that since nothing in state law prevented tacking two part-time jobs together, the speech pathologist was entitled to an award of back pay.

In calculating the average weekly wage of a former employee for purposes of determining the basis for partial disability payment under worker's compensation, an appellate court in Pennsylvania upheld an administrative appeal board's decision about the length of a teacher's employment.[161] The court disagreed with the plaintiff's argument that his weekly wage should have been based on the number of months that he actually worked. Instead, the court stated that since the teacher's contract was stated in terms of an annual amount, the partial disability rate should have been based on twelve months.

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[157] Subashi v. Unemployment Compensation Bd. of Rev., 713 A.2d 1177 [128 Educ. L. Rep. 288] (Pa. Commw. Ct. 1998).

[158] Caston Sch. Corp. v. Phillips, 689 N.E.2d 1294 [123 Educ. L. Rep. 884] (Ind. Ct. App. 1998).

[159] Alford v. Board of Educ. of Buena Reg'l Sch. Dist., 708 A.2d 439 [125 Educ. L. Rep. 499] (N.J. Sup. Ct. App. Div. 1998).

[160] Breza v. Ohio County Bd. of Educ., 497 S.E.2d 548 [124 Educ. L. Rep. 1128] (W. Va. 1997).

[161] Stofa v. W.C.A.B. (Florence Mining Co.), 702 A.2d 381 [122 Educ. L. Rep. 491] (Pa. Commw. Ct. 1997).

A string of cases from New York addressed whether employees were eligible for retroactive retirement participation. School employees prevailed in seven of the eleven cases. An appellate court decreed that a teacher was entitled to retroactive membership in the state Teachers' Retirement System (TRS) where her application was deemed to be the date on which she requested the transfer of credits from another retirement system.[162] The court added that since the teacher's application also had served as notice of claim, the state was required to grant her request for membership.

In New York, an appellate court struck down a school board's determination that a part-time teacher was ineligible for retroactive membership in the TRS.[163] The court mandated that other part-time teachers having joined in the past was an insufficient basis for denying the plaintiff's request since the district failed to produce evidence regarding the source of knowledge for the decisions by the other educators.

Another appellate court in New York asserted that a school district's denial of a teacher's request for retroactive membership in the TRS lacked a rational basis.[164] The court ascertained that the plaintiff's prior experience in the TRS as a full-time teacher was insufficient to put her on notice years later that she had the option of rejoining it as a substitute.

In New York, an appellate court affirmed that a teacher's aide was entitled to retroactive membership in the TRS.[165] The court contended that even though the aide signed a written acknowledgment that she had been informed about her right to join the public retirement system, her district failed to provide a procedure that a reasonable person would have recognized as requiring a formal decision on enrollment. Similarly, a retired teacher prevailed in her claim that she was entitled to retroactive membership in the TRS.[166] An appellate court concluded that the teacher was eligible to participate in the TRS since her district failed to demonstrate that it informed her of the process regarding participation that a reasonable person would have recognized as offering her a clear choice.

Where a retired teacher in New York challenged the denial of her request for retroactive membership in the TRS, an appellate court reversed in her favor.[167] The court believed that the district's claim that all teachers had the opportunity to join the TRS during a certain period of time was too vague to deny her application for retroactive membership.

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[162] Capone v. Board of Educ. of Lafayette Cent. Sch. Dist., 667 N.Y.S.2d 168 [123 Educ. L. Rep. 841] (App. Div. 1997).

[163] Antwerp v. Board of Educ. for the Liverpool Cent. Sch. Dist., 668 N.Y.S.2d 737 [124 Educ. L. Rep. 368] (App. Div. 1998).

[164] Sadoff v. Ithaca City Sch. Dist., 668 N.Y.S.2d 82 [123 Educ. L. Rep. 1257] (App. Div. 1998).

[165] Kendall v. Board of Educ. of South Orangetown Cent. Sch. Dist., 676 N.Y.S.2d 670 [128 Educ. L. Rep. 831] (App. Div. 1998).

[166] Spector v. Board of Educ. of the Yonkers City Sch. Dist., 674 N.Y.S.2d 760 [127 Educ. L. Rep. 970] (App. Div. 1998).

[167] Merritt v. Ithaca Sch. Dist., 678 N.Y.S.2d 829 [129 Educ. L. Rep. 1140] (App. Div. 1998).

An appellate court in New York reversed an administrative finding that a teacher was ineligible for retroactive participation in the retirement system.[168] The court rejected the board's claim that because it deducted almost eight dollars a month for Social Security for a year thirty years earlier, the teacher was on notice that she had once been in the TRS. The court added that there was no reasonable connection between the teacher's having received a refund for the Social Security payments and her knowledge that she was in the TRS.

School employees lost the last four suits in New York challenging the denials of their requests for retroactive membership in the TRS. In three related cases, appellate courts affirmed the denials of requests by teachers.[169] The courts found that because the teachers were participants based on their having had contributions deducted from their pay checks, there was a rational basis for denying their applications for reenrolling in the TRS. In the final case, an appellate court affirmed the denial of a teacher's application for retroactive membership in the TRS.[170] The court relied on evidence that despite her claim to the contrary, the teacher had received an application to join the TRS but failed to return it to her district's office.

Two cases dealt with retirement service credit. An appellate court in Ohio affirmed that a retired school superintendent was not entitled to a writ of mandamus compelling the state's retirement service to recalculate his benefits using the last two years of employment.[171] The court declared that because communication prior to retirement about including the two years was only an estimate, it was an inappropriate basis on which to base a request for a writ of mandamus.

An appellate court in Michigan affirmed a school board's denial of retirement service credit to employees for periods during which they received worker's compensation benefits.[172] The court was of the view that the employees should not have received service credit since it was not compensation within the meaning of the law on retirement.

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[168] Malchow v. Board of Educ. for the North Tonawanda Cent. Sch. Dist., 679 N.Y.S.2d 172 [130 Educ. L. Rep. 243] (App. Div. 1998).

[169] Lovett v. Manhasset Pub. Schs., 666 N.Y.S.2d 654 [123 Educ. L. Rep. 812] (App. Div. 1997); Planck v. Niskayuna Sch. Dist., 666 N.Y.S.2d 740 [123 Educ. L. Rep. 817] (App. Div. 1997); Weston v. Board of Educ. of Binghamton City Sch. Dist., 666 N.Y.S.2d 747 [123 Educ. L. Rep. 823] (App. Div. 1997).

[170] Kelley v. Comptroller of State of N.Y., 671 N.Y.S.2d 808 [125 Educ. L. Rep. 792] (App. Div. 1998).

[171] State v. State Teachers Retirement Bd., 690 N.E.2d 36 [123 Educ. L. Rep. 889] (Ohio Ct. App. 1996).

[172] Adrian Sch. Dist. v. Michigan Pub. Sch. Employees Retirement Sys., 582 N.W.2d 767 [128 Educ. L. Rep. 860] (Mich. Ct. App. 1998).

Tenure

Tenure, which is governed by state law, pertains to an employee's having acquired the status whereby removal, unless modified by a collective bargaining agreement, is subject to specified procedural requirements. A trial court in New York invalidated a provision in a contract in which a school board asked teachers to waive their rights under the state's tenure system. In this conflict between "state public policy expressed in the Education Law," and "local policy arising from fiscal consideration as expressed in recent attempts by local school boards to eliminate tenure," the court wrote that the waiver provision "contraven[ed] . . . the entire legislative scheme . . . to [return] the most senior, most experienced teachers . . . ."[173] Whether a school employee has acquired tenure relates to the employee's status and whether a school district has conferred tenure through default or acquiescence.

Tenure Status

The Court of Appeals of New York affirmed that an elementary school teacher who was originally tenured in special education but was later assigned to teach sixth grade subjects to a mixed class of regular and learning-disabled students could be awarded retroactive seniority in the area of elementary education.[174] As a result, the court held that since the teacher had more seniority, she could be retained over a colleague who had more experience working with elementary students but fewer years as a tenured faculty member.

An appellate court in Alabama affirmed that a teacher who completed one year of service in an alternative program under a standard contract after working for two years under an hourly employment relationship was not entitled to tenure.[175] The court observed that the teacher, who had only one year of service, was ineligible for tenure because state law required three consecutive years under a written contract plus reemployment for the succeeding year.

Tenure by Default or Acquiescence

Courts were split over whether educators could receive tenure by means other than teaching full time. According to the Supreme Court of Oklahoma, a teacher who worked a fourth year under a temporary contract was not entitled to tenure by default.[176] The court ruled that once the teacher signed her fourth year contract, she lost her claim to tenure at the end of that year.

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[173] Lambert v. Board of Educ. of the Middle County Cent. Sch. Dist., 664 N.Y.S.2d 422, 423-24 [122 Educ. L. Rep. 518] (Sup. Ct 1997).

[174] Kaufman v. Fallsburg Cent. Sch. Dist. Bd. of Educ., 666 N.Y.S.2d 1000 [123 Educ. L. Rep. 833] (N.Y. 1997).

[175] Nelson v. Etowak County Bd. of Educ., 703 So.2d 413 [122 Educ. L. Rep. 1328] (Ala. Ct. Civ. App. 1997).

An appellate court in Minnesota reinstated a principal's claim that his contract was wrongfully nonrenewed.[177] The court noted that since the principal was tenured as a school counselor, state law did not subject him to a new probationary period when he was named principal. The court added that once the district issued the contract, it was equitably estopped from claiming that the principal lacked appropriate licensure when he was appointed.

In a second case from Minnesota, an appellate court maintained that a probationary teacher who completed seventy-nine hours of nonsubstitute teaching during the 1993-1994 school year before entering into a contract as a regular instructor for 1994-1995 completed the two years of probationary employment toward tenure.[178] The court pointed out that even though the district specified that work done in 1993-94 would not count as probationary status, the failure of state law to establish a minimum number of hours a teacher must work to complete a year of probationary employment meant that the year counted toward tenure.

An appellate court in Massachusetts ruled that the state's tenure statute did not confer *de jure* tenure on a head basketball coach who served in that position for twenty years.[179] The court indicated that state law expressly established fixed terms of appointment for coaches and extended tenure only to those performing the functions of teachers.

Certification

Certification Standards

An appellate court in New York affirmed an order directing a school district to issue a teaching license to an applicant who had been convicted of a drug offense.[180] The court decided that the board's denying the applicant a license was arbitrary and capricious because the applicant had obtained a certificate of relief from disabilities and produced evidence of his rehabilitation.

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[176] Scheer v. Independent Sch. Dist. No. I-26 of Ottawa County, Okla., 948 P.2d 275 [122 Educ. L. Rep. 833] (Okla. 1997).

[177] Lucio v. School Bd. of Indep. Sch. Dist. No. 625, St. Paul, Minn., 574 N.W.2d 737 [124 Educ. L. Rep. 393] (Minn. Ct. App. 1998).

[178] Flaherty v. Independent Sch. Dist. No. 2144, Chisago Lakes Area Schs., 577 N.W.2d 229 [125 Educ. L. Rep. 878] (Minn. Ct. App. 1998).

[179] Porrell v. School Comm. of Wayland, 694 N.E.2d 399 [125 Educ. L. Rep. 858] (Mass. Ct. App. 1998).

[180] Arrocha v. Board of Educ. of City of New York, 677 N.Y.S.2d 584 [129 Educ. L. Rep. 445] (App. Div. 1998).

An appellate court in Oklahoma stated that a school counselor who twice failed the state certification examination while serving under a temporary certificate did not have a right to the renewal of her contract.[181] Reversing in favor of the district, the court asserted that since a second year under a temporary certificate was not possible, the teacher's employment contract was void. The court added that state law prohibited teachers from bring hired if they did not possess the appropriate certification.

Decertification, Revocation, or Suspension

An appellate court in Louisiana found that the State Board of Elementary and Secondary Education could deny an application for a teaching certificate to a person whose felony conviction was not specifically on the list of offenses for which it could not be issued.[182] The court reasoned that in the absence of clear legislative direction, the board's discretion was not limited by the enumerated felonies.

Conclusion

The issues that the courts have addressed in employment law have not changed appreciably over the past decade. Overall, employees and school districts appear to be fairly evenly split on success in the courts. The general shift of litigation from federal to state courts reflects the increased emphasis on statutory rather than constitutional issues. Moreover, the greater volume of litigation in state courts indicates increased level of legislative and administrative activity regulating education.

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[181] Guthrie v. Independent Sch. Dist. No. 1-30, 958 P.2d 802 [127 Educ. L. Rep. 439] (Okla. Ct. App. 1997).

[182] Newchurch v. Louisiana State Bd. of Elementary and Secondary Educ., 713 So. 2d 1269 [128 Educ. L. Rep. 523] (La. Ct. App. 1998).

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SCHOOL GOVERNANCE

Donald F. Uerling

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Introduction

This chapter reviews cases that resolved issues of school governance at the state and local levels. The discussion covers reported cases from both state and federal courts.

State Education Agencies

In the first of three state-level agency cases, elected members of the state board of education challenged two executive orders issued by the governor of Michigan that transferred their powers to the superintendent of public instruction. The board members contended that the orders exceeded the authority vested in the governor by the state constitution. On further review, an appellate court reversed in holding that the executive orders did not infringe on the board's constitutional powers or prerogatives.[1] The court asserted that the orders were within the scope of the governor's authority and that the transfer of administrative and rule making power to the superintendent, while leaving policy making with the board, protected its ultimate authority over the state's educational system.

Two related cases from Oregon involving the Teacher Standards and Practices Commission arose from the same set of facts. The commission investigated charges of misconduct against a superintendent. These charges were later dismissed. However, an employee of the commission gave a copy of a computer disk to a third party who disclosed confidential information about the investigation to others in a school district. The superintendent sued the commission, alleging negligent supervision of an employee. When a trial court deemed the action as one for defamation, which was subject to a one-year statute of limitations, it precluded the claim as time-barred because it was not filed in a timely fashion. An appellate court reversed on the ground that the claim was for negligent supervision of an employee that resulted in release of confidential information, not for defamation.[2] The court remanded for a determination of whether the suit was filed within the appropriate statute of limitations.

Subsequently, the superintendent sued the investigator, who confessed judgment in the amount of $200,00 and assigned his rights, including indemnification, in exchange for a covenant not to execute the judgment.

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[1] Straus v. Governor, 583 N.W.2d 520 [128 Educ. L. Rep. 1196] (Mich. Ct. App. 1998).

[2] Bradbury v. Teacher Stands. and Practices Comm'n, 947 P.2d 1145 [122 Educ. L. Rep. 806] (Or. Ct. App. 1997).

At the same time, the superintendent unsuccessfully sued the commission for indemnification. On further review, an appellate court reversed and remanded in ascertaining that depending on the resolution of disputed factual issues over the investigator's status and behavior, enforcement of the contract to preclude the indemnification claim could offend public policy.[3]

State Funding

State Finance Plans

Of the seven reported cases involving challenges to state school finance plans, three were successful, two were not, and two left it to other entities to propose solutions. In the first of two cases from Arizona, the governor sought a declaration that amendments to the state's plan to fund school construction complied with earlier judicial mandates. After a trial court denied the governor's motion, the Supreme Court of Arizona affirmed.[4] Although the "Assistance to Build Classrooms Fund" was intended to remedy disparities in the ability of property-rich and property-poor school districts to provide adequate facilities, the court maintained that the new legislation did not meet state constitutional requirements. The court found that the legislation itself was the cause of substantial disparities among districts, that the legislature could not delegate the responsibility to provide adequate capital facilities to districts, and that the law did not create, let alone meet, an adequate capital facilities standard.

The legislature then enacted the "Students FIRST Act" of 1998 in an attempt to satisfy the constitutional requirement of a "general and uniform public school system." Accepting the governor's petition for a special action to hear an appeal, the Supreme Court of Arizona decreed that the Act established minimum adequate facility standards and provided funding at a level below which no district could fall.[5] Yet, the court added that since the financing system still created substantial disparities between districts that chose to participate and those that opted out, it failed to satisfy the constitutional requirement.

Taxpayers sought further review of the denial of the suit for declaratory and injunctive relief that questioned the state's method of funding public education. The Supreme Court of New Hampshire reversed and held that the property tax levied to fund education is, by virtue of the state's duty to provide adequate public schools, a state tax that violated the state constitution because it was disproportionate and unreasonable.[6] The court commented that although taxes levied by districts are local in the sense that they are placed on property within their boundaries, they are actually state taxes authorized by the legislature to fulfill constitutional requirements. The court believed that since tax rates varied from one district to another by as much as 400%, this unreasonable and disproportionate system was unconstitutional.

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[3] Welker v. Teacher Stands. and Practices Comm'n, 953 P.2d 403 [124 Educ. L. Rep. 1108] (Or. Ct. App. 1998).

[4] Hull v. Albrecht, 950 P.2d 1141 [124 Educ. L. Rep. 1061] (Ariz. 1997).

[5] Hull v. Albrecht, 960 P.2d 634 [128 Educ. L. Rep. 371] (Ariz. 1998).

An appellate panel in Louisiana rejected a constitutional challenge to the state's school finance plan. The court declared that the plaintiffs failed to demonstrate that a trial would have enabled them to show either that the minimum foundation program did not further an appropriate state interest so as to violate equal protection or that the amount of funding available under the plan did not satisfy the requirement that the state insure a minimum foundation for education.[7]

A civil rights organization and members of an ethnic minority filed suit alleging that the state's funding of New York City schools violated their rights under various provisions of state and federal law. After dismissing the city school system as a defendant and the state law claims for lack of jurisdiction, a federal trial court turned to the federal claims. The court dismissed the Equal Protection claims because the plaintiffs failed to show an absence of a rational relationship between attendance-based funding and hold-harmless provisions and the state's legitimate interests.[8] In addition, the court dismissed the title VI claims since the complaint did not include allegations of intentional discrimination insofar as any disparate impact resulted from factors other than state action.

In the latest of a long line of actions addressing the state's constitutional mandate of "a thorough and efficient system of free public schools," the Supreme Court of New Jersey explained the remedial measures that must be implemented to ensure that public school children from the poorest urban communities receive the educational entitlements guaranteed by the state constitution.[9] The court noted that while funding was a critical element in providing this education, necessary levels of financing would depend on many variables that could not be calculated at that time. The court directed the commissioner of education to promulgate regula-

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[6] Claremont Sch. Dist. v. Governor, 703 A.2d 1353 [123 Educ. L. Rep. 233] (N.H. 1997).

[7] Charlet v. Legislature of Louisiana, 713 So. 2d 1199 [128 Educ. L. Rep. 510] (La. Ct. App. 1998).

[8] African American Legal Defense Fund v. New York State Dept. of Educ., 8 F. Supp. 2d 330 [128 Educ. L. Rep. 204] (S.D. N.Y. 1998).

[9] Abbott by Abbot v. Burke, 710 A.2d 450 [126 Educ. L. Rep. 258] (N.J. 1998).

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tions including remedial measures and to provide guidance for individual schools that applied for needed programs and necessary funding.

A school funding case from Alabama was more about the judicial process and separation of powers than about finance plans; nevertheless, the opinion is instructive. Even though a trial court acknowledged that the public education system violated provisions of the state constitution, that portion of the case was not appealed. On the two issues that were appealed, the Supreme Court of Alabama affirmed that a trial court did not exceed its authority in addressing the merits of whether the state's public school system violated the state constitution. However, the court vacated the judgment of the trial court over the implementation of a remedy.[10] The panel contended that it was not positing that the trial court lacked the power to implement a remedy. Rather, it observed that the trial court abused its discretion by attempting to impose a remedy before providing the legislative and executive branches of government the first opportunity to devise a constitutional system.

Desegregation Plans

Three "employee heavy" school districts sued the State of Arkansas, alleging that a new system of school funding violated a desegregation settlement agreement. Under the former funding system, the state separately paid for teacher retirement and health insurance. The new plan did not allow for separate payments as state aid was distributed based on average daily membership and a district's relative wealth. After a federal trial court entered the districts' motion for summary judgment, the Eighth Circuit affirmed.[11] The court was of the opinion that since the "employee heavy" districts received less state funding under the new system than they would have under the old one, the new plan violated the settlement agreement.

Special Education

In Ohio, a board of education sought partial reimbursement from the state department of education for additional compensation that it paid for special education. Following the denial of its request, the board unsuccessfully filed suit charging that the state was obligated to pay. On further review, an appellate court affirmed that the relevant statutes allowed the state department to exercise discretion in providing reimbursement.[12]

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[10] *Ex parte* James, 713 So. 2d 869 [128 Educ. L. Rep. 415] (Ala. 1997).

[11] Little Rock Sch Dist. v. North Little Rock Sch. Dist., 148 F.3d 956 [127 Educ. L. Rep. 740] (8th Cir. 1998).

[12] Cuyahoga Falls Sch Dist. Bd. of Educ. v. Ohio Dept. of Educ., 693 N.E.2d 841 [125 Educ. L. Rep. 206] (Ohio Ct. App. 1997).

Allocation of Funds

A non-profit corporation representing districts challenged the educational funding system, claiming that the system violated the state constitution by not allocating twenty-five percent of state revenue to support public schools. In writing that certain receipts were not state revenue for purposes of this provision, a trial court upheld the constitutionality of the system. On further review, the Supreme Court of Missouri affirmed.[13] The court decided that the federal funds at issue were not state revenue even though they were deposited in the state treasury.

In a school finance case from Texas, districts sued the state board of education for not distributing a supplemental technology allocation. The state board was confronted with two conflicting statutes; the first required it to set aside $60 million in the textbook fund to supplement technology while the second was an appropriations act that directed the same money to be placed into the school finance system. As such, the board was faced with an unfunded mandate to supplement technology. An appellate court affirmed that the state board did not have authority to expend more money from the textbook fund than the legislature appropriated.[14]

A county in North Carolina chose to distribute residual sales tax revenue using an ad valorem approach rather than a per capita method. As a result, a city school district levied a special ad valorem tax to receive a portion of this revenue while a county system without such a tax did not receive any. After a trial court rejected a challenge to the county's method of distributing the sales tax funds, an appellate court affirmed.[15] The court was of the opinion that not only was there was no conflict between statutes providing for mandatory and discretionary distributions but also that a specific statute dealing with the distribution of sales tax proceeds controlled over a general law dealing with the disbursement of county appropriations. The court also remarked that the county system failed to present evidence that its students were denied equal access to a sound basic education in violation of either equal protection or due process.

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[13] Committee for Educ. Equality v. State, 967 S.W.2d 62 [126 Educ. L. Rep. 538] (Mo. 1998).

[14] Socorro Indep. Sch. Dist. v. State Bd. of Educ., 968 S.W.2d 547 [126 Educ. L. Rep. 1126] (Tex. Ct. App. 1998).

[15] Banks v. County of Buncombe, 494 S.E.2d 791 [123 Educ. L. Rep. 361] (N.C. Ct. App. 1998).

Special Schools and School Districts

Charter Schools

Applicants for a charter school in Colorado sought judicial enforcement of an order issued by the state board of education which, after a second appeal, approved the issuance of a charter by a local board of education in principle, but directed the parties to continue negotiations. A trial court entered its judgment enforcing the state board's order, but an appellate panel reversed.[16] The court reasoned that the state board exceeded its authority under the charter schools act. When acting on a first appeal, the court judged that if the state board deems that a local board's denial of a charter application is contrary to the interests of the pupils, school district, or community, then it shall remand with specific recommendations about matters for reconsideration. However, the court indicated that when, as here, a board acts on a second appeal, it can only remand with instructions to approve the application because it lacks the authority to approve a charter in principle but require further negotiations on the details.

In a case from Arizona, a private school challenged the state board of education's denial, and a trial court's affirmation, of its application for a charter. An appellate court reversed in part and remanded for further proceedings since the board had not set out basic findings of fact and conclusions of law as required by the state's administrative procedures act.[17] The appeal raised many other issues, all but one of which were resolved in favor of the state board. The court pointed out that the school should have been allowed to revise its application to address the issue of creditworthiness. However, the court rejected the school's claim that the board exceeded its statutory powers in denying a charter based on creditworthiness, gave inadequate notice of deficiencies, failed to engage in required rule making, violated the state's open meeting law, and violated its constitutional rights to freedom of expression and association, due process, and equal protection.

Special School Districts

In another chapter in the story of the Village of Kiryas Joel, the New York State legislature again attempted to create a constitutionally valid special education program to meet the needs of this religious community. Unlike earlier versions, the new law applied to municipalities and school districts yet to be formed rather than just the existing system. Taxpayers successfully filed suit as a trial court struck down the new law as unconstitutional. On further review, an appellate court affirmed that the new version of the statute, like its predecessors, lacked the neutrality toward religion mandated by the Establishment Clause.[18] The new statute not only applied to too few existing municipalitities, its application to others of the future was speculative; thus, it clearly provided an impermissible preference to the Village in response to the Satmars' desire to provide their disabled children with special education in an exclusive environment, which had the primary effect of endorsing Satmar religioius beliefs. The court concluded that the statute clearly provided an impermissible preference to the Village in response its residents' desires to provide their disabled children with special education in an exclusive environment since this had the primary effect of endorsing Satmar religious beliefs.

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[16] Booth v. Board of Educ. of Sch. Dist. No. 1, 950 P.2d 601 [123 Educ. L. Rep. 923] (Colo. Ct. App. 1997).

[17] Shelby Sch. v. Arizona State Bd. of Educ., 962 P.2d 230 [128 Educ. L. Rep. 1254] (Ariz. Ct. App. 1998).

Special Schools

A suburban district in Michigan entered into a contract with a private school to conduct an alternative education program. The private school was located within the boundaries of a nearby city school district that was home to most of the pupils who were enrolled in the special program. When the suburban school attempted to collect state aid for the students who attended the private school, a trial court rejected the city system's challenge. On further review, an appellate court reversed on the ground that the suburban district could not receive state aid for the city residents who attended the private school that was located within the city system's boundaries as long as the city system did not consent to such an arrangement.[19]

Special Governance Arrangements

Taxpayers and registered voters in Ohio sought declaratory relief to prevent the implementation of a statute that would have created a new classification of "municipal school district." A muncipal district was defined as a district that had been under state control by order of a federal court and which would function under a board appointed by the mayor under requirements different from those applicable to other districts. A federal trial court denied relief on the basis that the law did not violate the Equal Protection Clause by providing for appointed board members and for eliminating certain licensing requirements for administrators, did not violate the uniformity clause in the state constitution, and did not create a conflict between a mayor's duty to the city and his authority to appoint school board members.[20] According to the court, the legislature had the power to control the referendum vote as provided for in the statute and the federal voting rights act did not apply to appointed officials.

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[18] Grumet v. Pataki, 675 N.Y.S.2d 662 [128 Educ. L. Rep. 801] (App. Div. 1998).

[19] Board of Educ of Detroit Pub. Schs. v. Board of Educ. of Romulus Comm. Schs., 575 N.W.2d 90 [124 Educ. L. Rep. 693] (Mich. Ct. App. 1997).

After a school system in New Jersey was taken over by the state, an administrator's association filed a grievance contesting entitlements to vacation days. Although the displaced district's past practice of awarding unearned vacation days was inconsistent with the language of the collective bargaining agreement, the arbitration panel ruled in favor of the association. On further review, a trial court affirmed in favor of the administrators but an appellate tribunal reversed.[21] The court offered that the arbitration panel exceeded its authority in permitting the past practices to, in effect, amend the bargaining agreement. The court ascertained that since the law authorizing the state takeover granted strong powers to modify and amend the practices of failed local districts, the board was not bound by those past practices.

The District of Columbia control board, exercising its congressional mandate to reorder local government, divested the board of education of its authority over the schools, transferred most of its power to a transitional board of trustees, and summarily fired the superintendent. A federal trial court dismissed a challenge to the control board's authority. On further review, the Federal Circuit Court affirmed in part and reversed in part, rejecting the challenge to the control board's authority over the board of education.[22] At the same time, the court was satisfied that the portion of the order pertaining to the board of trustees was ultra vires and that the provision permitting the discharge of the superintendent without cause was contrary to law.

Pursuant to Illinois' Emergency Financial Assistance Law, when the state board of education certified a local district as being in financial difficulty, it established a financial oversight panel. Subsequently, the local board and its superintendent sought both to enjoin the panel from removing members from office and to obtain a declaratory judgment that the statute violated constitutional guarantees of due process and equal protection. A trial court entered a judgment in favor of the plaintiffs, but the Supreme Court of Illinois reversed and remanded. The court found that the panel acted within its statutory authority when it directed the local board not to renew the superintendent's contract and removed board members for failing to follow valid orders. The court also found the removal of a board member does not violate the fundamental right to vote, that the plaintiffs, as voters, were not entitled to procedural due process, that the equal protection claim lacked merit because districts certified as being in financial difficulty pursuant to the statute and those not so certified are not similarly situated, and that the operative section of the statute was neither an improper delegation of authority, nor unconstitutionally vague.[23] However, the court added that insofar as board members have a property interest in their positions, they are entitled to pretermination hearings before they can be removed from office.

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[20] Spivey v. State of Ohio, 999 F. Supp. 987 [126 Educ. L. Rep. 897] (N.D. Ohio 1998).

[21] City Ass'n of Supervisors and Administrators v. State Operated Sch. Dist. of Newark, 709 A.2d 1328 [126 Educ. L. Rep. 243] (N.J. Super. Ct. App. Div. 1998).

[22] Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth., 132 F.3d 775 [122 Educ. L. Rep. 1168] (D.C. Cir. 1998).

School District Boundary Changes

Residents of a defunct school district filed a declaratory judgment action seeking to void two annexation elections that had been conducted thirty years earlier. The Supreme Court of Oklahoma affirmed a grant of summary judgment in favor of the existing district.[24] The court maintained that a declaratory judgment cannot be used as a remedy to challenge an election absent a showing that the statutory remedy was inadequate or that the plaintiffs were deprived of a judicially protected interest.

In an attempt to promote the reorganization and consolidation of small systems, a state legislature enacted laws providing for the "affiliation" of elementary school districts with K-12 districts. Parents brought a mandamus action against the board of the larger district with which their elementary system affiliated, claiming that a provision in their agreement created a duty to provide transportation or mileage reimbursement. A trial court generally agreed with the parents. On appeal, the Supreme Court of Nebraska affirmed in part and reversed in part, in decreeing that although the statute did not impose a clear duty, the affiliation agreement did require the district to provide transportation but not reimbursement for mileage.[25] In addition, the court believed that since the affiliation agreement was not a contract, but was a statutory form of district reorganization that imposed duties owed to the public, it had the effect of law.

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[23] East St. Louis Fed'n of Teachers, Local 1220 v. East St. Louis Sch. Dist. No. 189 Fin. Oversight Panel, 687 N.E.2d 1050 [123 Educ. L. Rep. 293] (Ill. 1997).

[24] Macy v. Oklahoma City Sch. Dist. No. 89, 961 P.2d 804 [128 Educ. L. Rep. 893] (Okla. 1998).

[25] State *ex rel* Fick v. Miller, 584 N.W.2d 809 [129 Educ. L. Rep. 800] (Neb. 1998).

School District Board Members

In a declaratory judgment action, the federal trial court in New Jersey mandated that a state law, which led to a violation of the "one person, one vote" principle, was unconstitutional as applied to the nine-member school board of a regional high school district.[26] The court noted that pursuant to the statute, at least one board member had to be elected from each of the original municipalities forming the district. However, there was an unacceptably large range in population among those municipalities. As such, the court called upon the legislature to provide a solution while requesting the state commissioner of education to apportion a properly weighted vote until such time as the legislature could act. The parties then created a plan that the court accepted as consistent with the "one-person-one-vote" principle, the essence of which was to pair a smaller community with a larger community in a representative district, with consideration given to geographical location. The court subsequently approved this alignment since the total board vote remained at nine, with each vote representing approximately the same number of citizens.[27]

African-American plaintiffs sued a board of education in New York for allegedly violating the Voting Rights Act and seeking to enjoin election procedures. In rejecting their claim, a federal trial court first ascertained that the plaintiffs had to prove that a "standard, practice, or procedure" impairs the ability of minority voters to participate equally in the political process and to elect candidates of their choice.[28] After a thorough review of the evidence, the court declared that the plaintiffs failed to raise sufficiently serious questions on the merits of their voting rights claims to warrant injunctive relief.

In a second case from New York, a three-judge district court addressed whether a 1973 statute, which provided for the appointment of a seven-member board of education for the New York City public schools, was an unenforceable change in voting practices or procedures from those in effect on November 1, 1964, within the meaning of the Voting Rights Act of 1965. The court determined that because the elective system that was supposed to have been established in 1970 was never implemented, the earlier interim appointive system in place during 1964 provided the benchmark for comparison. Consequently, the court held that a change from one appointive system to another did not require preclearance as it did not constitute the kind of change contemplated by the Voting Rights Act.[29]

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[26] Township of Marlboro v. Board of Educ. of Freehold Reg'l High Sch., 992 F. Supp. 756 [125 Educ. L. Rep. 100] (D.N.J. 1998).

[27] Township of Marlboro v. Board of Educ. of Freehold Reg. High Sch., 9 F. Supp. 2d 500 [128 Educ. L. Rep. 710] (D. N.J. 1998).

[28] Coleman v. Board of Educ. of Mount Vernon, 990 F. Supp. 221 [124 Educ. L. Rep. 877] (S.D. N.Y. 1997).

On remand from the Supreme Court, the majority of a three-judge district court in Louisiana adhered to an earlier action granting preclearance, under section 5 of the Voting Rights Act, to a redistricting plan for school board elections. The court explained that the evidence was insufficient to rebut the board's *prima facie* showing that it did not intend to place racial minorities in a less favorable position with respect to their exercise of the electoral franchise.[30]

In Florida, African-American voters sued county school boards, alleging that state laws providing for the at-large election of board members violated section 2 of the Voting Rights Act. On remand from the Eleventh Circuit, a federal trial court acknowledged that the plaintiffs sufficiently established discriminatory intent with regard to the statute. However, the court was also of the view that the plaintiffs failed to prove the discriminatory results required for a violation to the Act. In order to resolve whether the at-large system resulted in the denial or abridgement of the plaintiffs' right to vote due to their race or color, the court ordered further proceedings to procure additional probative evidence.[31]

School District Board Meetings

Notice of Meetings

A case from Ohio addressed the adequacy of notice for school board meetings. A teacher unsuccessfully sued his board, alleging a number of violations of state law when he was not hired as a coach. On further review, an appellate court affirmed a grant of summary judgment in favor of the board.[32] In commenting that the board gave adequate notice of the special meeting at which it acted, the court wrote that the state open meetings statute distinguishes between special and regular meetings such that what might be a reasonable form or method of notice for the former might not be acceptable for the latter.

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[29] Warden v. Pataki, 12 F. Supp. 2d 325 [129 Educ. L. Rep. 161] (S.D.N.Y. 1998).

[30] Bossier Parish Sch. Bd. v. Reno, 7 F. Supp. 2d 29 [128 Educ. L. Rep. 125] (D.D.C. 1998).

[31] Johnson v. DeSoto County Sch. Bd., 995 F. Supp. 1440 [125 Educ. L. Rep. 1193] (M.D. Fla. 1998).

[32] Katterhenrich v. Federal Hocking Local Sch. Dist. Bd. of Educ., 700 N.E.2d 626 [129 Educ. L. Rep. 776] (Ohio Ct. App. 1997).

Open Meetings

In a case of first impression, an appellate court in Texas interpreted the meaning of the real estate exception to the state's open meeting law. A citizens' group claimed that a board of education could not conduct closed sessions to discuss the selection of a site for a middle school when it already owned one of the potential locations and entered into an agreement for another. The court affirmed a grant of summary judgment in favor of the board.[33] Evidence showed the board deliberated the value of parcels it owned and compared the parcels' worth with other properties that had negotiated prices. The court concluded that an open discussion of this matter would have detrimentally affected subsequent negotiations and that the board's deliberations fell within the scope of the real estate exception.

Administrators whose positions were eliminated through a reorganization of central staff filed suit alleging that the school board violated the state's open meetings law by discussing the matter in a closed session. Although the minutes reflected that the board went into a closed session to discuss personnel matters, at trial it took the position that it closed the meeting to consider pending litigation. On further review of a ruling in favor of the board, an appellate court reversed in favor of the administrators. Subsequently, the Supreme Court of Kentucky affirmed that the board violated the law.[34] The court observed that the specific reason given for a closed session must be the only topic covered and that a careful review of the circumstances and record revealed that the board went into executive session to discuss the reorganization plan, not pending litigation. Moreover, the court posited that the personnel exception did not allow a general discussion of a reorganization plan involving multiple employees.

Teachers whose contracts were terminated sued their school board alleging that the board violated the state's open meetings law. An appellate court in New York affirmed that the board violated the law because it could not exclude teachers from attending meetings.[35] Further, the court agreed that since the board engaged in a persistent pattern of deliberate violations of the law, the court was justified in annulling the board's actions and ordering it to pay attorneys fees.

The personal interests that are supposed to be protected by a closed session were at issue in a case where a teacher's aide initiated an incident with a high school student that resulted in the student calling the aide a vulgar name. Susbsequently, the student was suspended for one day and a disciplinary letter was placed in the aide's file. The student appealed his penalty to the board and requested an open hearing. However, the board granted the aide's request for a closed meeting based on her fear that her competence would be questioned and her reputation damaged. In response, the student's family filed suit alleging that the board violated the open meetings law. A trial court granted the student's request for an order restraining the board from further violations and for attorney fees. On further review, the Supreme Court of Iowa affirmed that the open meetings law afforded the student the right to an open session for a suspension hearing while granting an employee the right to a closed session for a performance evaluation.[36] The court decided that since this hearing was about a student suspension, not an employee's evaluation, the board should have conducted an open session.

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[33] Save Our Springs Alliance, Inc v. Austin Indep. Sch. Dist., 973 S.W.2d 378 [128 Educ. L. Rep. 915] (Tex. Ct. App. 1998).

[34] Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921 [122 Educ. L. Rep. 873] (Ky. 1997).

[35] Goetschius v. Board of Educ. of the Greenburgh Eleven Union Free Sch. Dist., 664 N.Y.S.2d 811 [122 Educ. L. Rep. 764] (App. Div. 1997).

Miscellaneous Issues

In California, teachers brought a section 1983 action against their school board, claiming that its practice of beginning meetings with an invocation violated their First Amendment rights. On the teachers' motion for a preliminary injunction, a federal trial court reasoned that the proper Establishment Clause analysis was the more lenient standard for a deliberative public body rather than the more stringent measure used for a school-related function. The court denied the teachers' request for relief in remarking that they had neither established the likelihood of success on the merits nor shown that they would have suffered irreparable harm if it denied their request for an injunction.[37]

Powers of School District Boards

Statutory Authority

In the first of two cases involving suits by individual members against their boards, a member filed suit contesting the board's policies regarding both her access to school records and to legal counsel. After a trial court ruled in favor of the board on all counts, the Supreme Court of Missouri affirmed in part and reversed in part.[38] The court was of the opinion that under the state's freedom of information statute, the board could not charge its members a fee to inspect district records that they had a right to see in their official capacities. In addition, the court indicated that once the board approved counsel for a school year, the superintendent had the authority to determine when to seek legal advice concerning school matters without first getting board approval. The court concluded that a board may hire private counsel to provide representation for matters involving its business regardless of whether it is in response to pending litigation or simply to obtain a legal opinion.

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[36] Schumacher v. Lisbon Sch. Bd., 582 N.W.2d 183 [128 Educ. L. Rep. 341] (Iowa 1998).

[37] Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 11 F. Supp. 2d 1192 [129 Educ. L. Rep. 149] (C.D. Cal. 1998).

[38] Rathmann v. Board of Dir. of Davenport Comm. Sch. Dist., 580 N.W.2d 773 [127 Educ. L. Rep. 428] (Mo. 1998).

The second case involved a board member in New Jersey who sought to recover expenses incurred in defending herself from a suit that the board brought against her. The board tried to prevent the member from attending closed sessions during which it discussed litigation that the parties had been involved in before she joined the board. The board member was willing to recuse herself to the extent of not participating, however, she insisted on being present. The state board of education ordered the board member's reimbursement and an appellate court affirmed.[39] The court judged that when board members are sued by reason of their membership on the board, the local board is required to reimburse said members for the cost of attorney fees.

A case from Philadelphia involved both statutory and constitutional issues. After a board of education adopted a policy providing for voluntary condom distribution in its high schools, a parent group challenged it as violating state and federal law. The board then had the suit removed to a federal trial court that granted its motion for summary judgment.[40] The court acknowledged that the program was authorized by state statute as either a health service or educational program, that the federal statutory and constitutional privacy rights of minors prohibited requiring parental permission, and that the parents liberty interests in directing the education and upbringing of their children were not violated because they could easily opt out of the program. On appeal, the Third Circuit affirmed the board acted within its statutory authority in implementing a consensual program to distribute condoms in public schools in order to prevent disease.[41] The court added that the board did not violate the constitutional rights of either students or parents insofar as it neither coerced participation nor offended the rights of parents to direct the care and custody of their children.

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[39] Quick v. Board of Educ. of Township of Old Bridge, 705 A.2d 1276 [124 Educ. L. Rep. 344] (N.J. Super. Ct. App. Div. 1998).

[40] Parents United for Better Schs. v. School Dist. of Philadelphia Bd. of Educ., 978 F. Supp. 197 [122 Educ. L. Rep. 155] (E.D. Pa. 1997).

[41] Parents United for Better Schs v. School Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 [127 Educ. L. Rep. 670] (3rd Cir. 1998).

In a second case presenting both statutory and constitutional issues, a trial court in Oklahoma denied injunctive relief to a radio broadcaster who objected to a $200 broadcast rights fee for a high school football game. An appellate court affirmed that independent school districts had implied power to charge and collect broadcast rights fees as incidental to powers expressly granted by statute.[42] Further, the court was convinced that the district was acting in a proprietary and not a governmental matter. Thus, the district's action in charging a fee to broadcast media but not to print media was not unconstitutionally differential treatment.

A case from Indiana involved only the issue of statutory authority where educational associations unsuccessfully sued a local board claiming that it exceeded its authority in enacting a school improvement plan. On further review, an appellate court affirmed that the board had not diluted the educators' authority, either by involving a school committee in the development of the plan or by requiring teacher evaluations to be based in part on student remediation and attendance rates.[43]

Board Policy

As developing case law suggested that a total prohibition against the distribution of religious materials in public schools would be unconstitutional, a board of education in West Virginia revised its policy to allow "passive distribution." This meant the board permitted constituents to make religious materials available on a display table in the schools one day each year. The display table also had a disclaimer saying the board did not endorse the material. Even so, a group unsuccessfully challenged the policy on the ground that it violated the Establishment Clause. On further review, the Fourth Circuit affirmed in part, but reversed as to elementary schools because the court was especially concerned about impressionable young children.[44] Insofar as the secondary schools were concerned, the court pointed out that the board's allowing at least limited access to the open forums it created for speech was consistent with its educational mission of simply affirming the right of religious speakers to use them on equal terms with others. According to the court, if the board had denied such access, it would have shown an impermissible hostility toward religious speech.

Board discretion to adopt policy was at issue in Michigan where two students who were expelled for possessing a BB gun on school premises

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[42] Oklahoma Sports Properties, Inc. v. Independent Sch. Dist. #11 of Tulsa County, 957 P.2d 137 [126 Educ. L. Rep. 486] (Okla. Ct. App. 1998).

[43] Indiana State Teachers Ass'n v. Board of Sch. Comm'rs of Indianapolis, 693 N.E.2d 972 [125 Educ. L. Rep. 570] (Ind. Ct. App. 1998).

[44] Peck v. Upshur County Bd. of Educ., 155 F.3d 274 [129 Educ. L. Rep. 77] (4th Cir 1998).

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challenged its dangerous weapons in school policy. A trial court enjoined the expulsions of the students. On further review, an appellate panel reversed and remanded for consideration of due process arguments *not reached by the lower court.*[45] *The court asserted that while the stat*utes cited as general references for the policy that excluded BB guns as dangerous weapons did not require expulsion for the possession, neither did they prohibit such an action. The court contended that in light of the broad discretion that the board enjoys in fashioning rules for student conduct, nothing precluded it from expelling a pupil for possessing a BB gun on school property.

The consequence of not having a policy in place was illustrated by a case from Oklahoma where a retired superintendent unsuccessfully sued a school board for refusing to pay him for the accrued and unused sick leave called for in his employment contract. An appellate affirmed that a statutory provision was dispositive.[46] The statute prohibited paying a school administrator amounts for accumulated sick leave that were not calculated using the same formula that applied for paying accumulated sick leave to other full-time employees. Insofar as the board never adopted a policy or other formula for calculating payments for accumulated sick leave, the court believed that the contractual provision was void because it was contrary to the law.

A case from Texas involving a challenge to a school board's student promotion policy provided an interesting discussion of the exhaustion of remedies doctrine. A trial court rejected a parental challenge to the policy for failing to exhaust administrative remedies. On further review, an appellate court reversed and remanded.[47] The court offered that since the state law that permitted appeals to the commissioner of education for alleged violations of school laws covered statutory, rather than constitutional, claims, the parents did not have to exhaust administrative remedies before pursuing a constitutional complaint. The court further found that while an aggrieved party must pursue administrative remedies when an allegation involves disputed issues of fact, a party need not do so if it is a pure question of law such as the case at bar that asked whether the policy violated state law.

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[45] Davis v. Hillsdale Community Sch. Dist., 573 N.W.2d 77 [123 Educ. L. Rep. 900] (Mich. Ct. App. 1997).

[46] Adams v. Independent Sch. Dist. No. 43 of Okmulgee County, 964 P.2d 237 [129 Educ. L. Rep. 835] (Okla. Ct. App. 1998).

[47] Gibson v. Waco Indep. Sch. Dist., 971 S.W.2d 199 [127 Educ. L. Rep. 1131] (Tex. Ct. App. 1998).

School District Financial Affairs

Taxing Authority

Where a city questioned a school district resolution that imposed a tax of 10% on the rental consideration paid for the privilege of leasing tax exempt realty in an urban locale, a trial court struck it down as unconstitutional. On further review, the Supreme Court of Pennsylvania ruled that while the tax did not violate the law exempting public property from taxation, it did unconstitutionally distinguish between lessees of tax exempt and nonexempt realty.[48]

Objectors in Illinois unsuccessfully claimed that a tax levy violated a state statute which provides that a school district shall pass a budget before adopting a tax levy. The levy in question was adopted in December 1993 while the budget for 1993-1994 had been adopted in May 1993. The budget for 1994-1995 was not adopted until May 1994. An appellate court affirmed that since the statute was ambiguous, it was capable of being read as either that the levy was for the school year in which it was adopted or for the year it was to fund.[49] The court noted that a tax levy filed during a fiscal year is for that fiscal year, regardless of when a district intends to spend the revenue it generates.

The board of a regional high school put a proposal to voters to change the method of apportioning tax appropriations among its three constituent municipalities. When majorities in two of the three voted against the proposal, the board was of the view that the proposal lost even though the total vote across all three municipalities was in its favor. Subsequently, the state board of education rejected a borough's challenge of this interpretation. On further review, an appellate court in New Jersey affirmed that the legislature required the apportionment of costs within a regional district to be approved by voters in each of the municipalities.[50]

Bond Levy Elections

After a $5,0000,000 building-fund levy failed in a general election on February 11, a board of education put the same question on the ballot of a special election on April 1, the date for annual runoff elections for board membership. The levy was approved in the special election. Taxpayers then unsuccessfully filed a protest with the court of tax review. On further appeal, the Supreme Court of Oklahoma affirmed that nothing in the state constitution or state law prohibited the board from calling a second election on the building-fund levy in the same year as a previous election at which the levy failed.[51] Further, the court was satisfied that forty-five days was adequate notice of the special election that took place on the statutorily set date for runoffs.

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[48] City of Harrisburg v. School Dist. of Harrisburg, 710 A2d 49 [126 Educ. L. Rep. 252] (Pa. 1998).

[49] *In re* Application of DuPage County Collector for 1993, 691 NE.2d 405 [124 Educ. L. Rep. 660] (Ill. App. Ct. 1998).

[50] Borough of North Haledon v. Board of Educ. of Manchester Rgn'l High Sch. Dist., 701 A.2d 925 [122 Educ. L. Rep. 198] (N.J. Super. Ct. App. Div. 1997).

A board of education in Michigan conducted a special election to authorize an $80,000,000 bond issue to borrow money to construct and improve school facilities. After the polls closed, the board of canvassers counted 5,733 votes in favor of the bond issue, 5,637 votes against, and 721 invalid votes. As such, several individuals petitioned for a recount or a special election claiming that there were mechanical malfunctions in the electronic voting equipment. A recount by the board of canvassers reached the same tally. After the board of canvassers rejected a second petition for a recount based on a claim that the equipment had malfunctioned, the plaintiffs unsuccessfully sought a writ of mandamus and injunctive relief. An appellate court affirmed that based on the board of canvassers' recount, the court had no obligation to order a special election and that the use of the electronic voting system did not violate election laws.[52]

Use of Funds

Where district voters twice rejected a board's budget proposals, it adopted a contingency plan for the 1995-1996 school year. Subsequent dissatisfaction with the superintendent's budget proposal for 1996-1997 led the board, by a 5-4 vote, to enter into a contract with a financial consulting service to develop a different budget. However, the board minority filed an appeal with the state commissioner of education who enjoined the expenditure as being unauthorized under a contingency budget. On further review, a trial court in New York affirmed that district payments to the financial consulting service did not satisfy the statutory standard of an ordinary contingent expense.[53]

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[51] *In re* Protest Against the Tax Levy of Ardmore Indep. Sch. No. 19, 959 P.2d 580 [127 Educ. L. Rep. 1082] (Okla. 1998).

[52] Vorva v. Plymouth-Canton Community Sch. Dist., 584 N.W.2d 743 [129 Educ. L. Rep. 795] (Mich. Ct. App. 1998).

[53] Education Alter, Inc. v. Mills, 667 N.Y.S.2d 1017 [123 Educ. L. Rep. 1252] (Sup. Ct. 1997).

School District Employment Affairs

Administrators

In the first of three cases resolving disputes over the employment of superintendents, taxpayers successfully sued a school board contending that its two-year employment contract with their chief administrator was unconstitutional. On further review, the Supreme Court of Oklahoma reversed in favor of the board.[54] The court decreed that the contract did not contravene constitutional provisions limiting extensions for certificated personnel to one year. The court explained that since the contract was executed in July of the first of two fiscal years to which it applied, the superintendent was not a teacher whose contract would have been automatically renewed in April of the prior year. Thus, the court ruled that the agreement entered into in July overrode any contract that was imposed by operation of law in April.

A school superintendent sought further review of the dismissal of her suit against a school board for wrongful nonrenewal, alleging that the written notice of her contemplated dismissal did not comply with statutory requirements. The Supreme Court of North Dakota reversed in favor of the superintendent.[55] The court ascertained that where the record did not show that the superintendent had knowledge of specific complaints and factual allegations against her prior to the notice of contemplated nonrenewal, the cryptic, general form of the notice that advised her only that nonrenewal was contemplated because of ability and competence was inadequate to allow her a meaningful opportunity to prepare for the hearing. The court also maintained that the lack of notice was exacerbated by the board's reliance at the hearing on evidence of factual allegations of which the superintendent had not been previously informed. The court wrote that although the superintendent had not objected specifically to the adequacy of the notice at the hearing, she challenged the testimony about which she had no prior notice and thus preserved the notice issue for appeal.

When an African-American school superintendent in Illinois was informed that his board of education was dissatisfied with his performance and unlikely to renew his contract, he refused to continue his duties until the end of his current contract. After the board suspended the superintendent with pay but did not renew his contract for the ensuing year, he unsuccessfully filed suit alleging violations of both statutory and constitutional rights. On further review, the Seventh Circuit affirmed that with regard to his title VII, the superintendent failed to carry his burden of demonstrating that the board's reasons for refusing to renew his contract and for suspending his contract were pretexts for racial discrimination.[56] Turning to the due process claim, the court agreed that the superintendent failed to establish the deprivation of any protected property interest in renewal of his contract.

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[54] Brandon v. Ashworth, 955 P.2d 233 [125 Educ. L. Rep. 919] (Okla. 1998).

[55] Simmons v. New Pub. Sch. Dist. No. Eight, 574 N.W.2d 561 [124 Educ. L. Rep. 389] (N.D. 1998).

In Ohio, a school superintendent filed a complaint against the state retirement board challenging the method by which it calculated his pension benefits. The superintendent's primary claim was that when he inquired about how to best structure his final contributions to his plan, the board deceived him by not informing him about the impact of a proposed amendment to the retirement law. When a trial court denied the superintendent's request for a writ of mandamus, he sought further review. An appellate court affirmed that it was proper for the retirement board to use current statutory provisions to estimate the superintendent's final average salary rather than an amendment that had not yet been enacted.[57]

Where a school board in Pennsylvania declared itself unable to provide a fair, unbiased dismissal hearing for a high school principal, the matter was referred to the state secretary of education who refused to hear the charge for lack of jurisdiction. On appeal of the secretary's order, an appellate court affirmed that while the secretary had jurisdiction to conduct a de novo review of a board's decision to dismiss, he did not have the authority to conduct a de novo hearing on the matter.[58] Further, the court observed that the board was obligated to carry out its lawful duties and that the common law principle of the Rule of Necessity required it to consider the case regardless of bias on the part of individual members.

Other administrative staff initiated litigation in three instances. Where a 1987 amendment to state law called for issuing written contracts to noncertificated administrators, a board failed to do so for an administrator whose contract it chose not to renew for the 1993-1994 school year. However, an appellate court rejected the administrator's request for a writ of mandamus compelling the board to issue him two-year contracts through 1996. On further review, the Supreme Court of Ohio affirmed that the administrator, who had been employed by operation of law under a series of two-year contracts beginning in 1987 and ending in 1993, was dismissed by a timely written notice.[59] The court was of the opinion that the administrator had neither established a clear legal right to continue on the job nor a corresponding legal duty on the part of the board to provide such employment.

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[56] Crim v. Board of Educ. of Cairo Sch. Dist. No. 1, 147 F.3d 535 [127 Educ. L. Rep. 554] (7th Cir. 1998).

[57] State *ex rel* Swartzlander v. State Teachers Retirement Bd., 690 N.E.2d 36 [123 Educ. L. Rep. 889] (Ohio Ct. App. 1996).

[58] Stroudsburg Area Sch. Dist. v. Kelly, 701 A.2d 1000 [122 Educ. L. Rep. 206] (Pa. Commw. Ct. 1997).

The dismissal of an affirmative action officer by a city board of education provides insight into the concept of speech on a matter of public concern along with the rights and responsibilities of administrators. As part of the school district's desegregation plan, its equity committee received its first official charge in 1985. The committee received a new charge in 1989. Part of the affirmative action officer's responsibility was to work with this committee. However, he was dismissed when the points of view he expressed about racial equity in the district met with the disfavor of his superiors. In the officer's suit contesting his dismissal, a trial court did not instruct the jury that his expressions were protected. On further review, an appellate court in Oklahoma reversed in favor of the officer.[60] The court posited that his expressions both before and after the 1989 charge were on matters of public concern. The court decided that when the interests of the officer were balanced against those of the board, he prevailed on the speech prior to the 1989 charge, but that the board was successful on the comments that he made after 1989. The court remanded the case for further proceedings on the question of the protected pre-1989 speech.

Where a school board in New York dismissed its business manager on grounds of incompetence and insubordination, her petition for review was transferred to an appellate court. The court agreed with the board that there was substantial evidence in the record supporting findings of failures to perform a number of important administrative duties, that the record did not support her allegations of a retaliatory discharge, and that her dismissal was not grossly disproportionate to the facts at bar.[61]

Teachers

In the first of three employment cases that turned on procedural issues, a board of education in New York sought further review of the denial of its motion for summary judgment where a teacher claimed that it improperly failed to appoint him to a full-time position. An appellate court reversed and dismissed in favor of the board.[62] The court commented that since the complaint presented a classic formulation of an article 78 proceeding, it was time-barred by the four-month statute of limitations.

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[59] State *ex rel* McGinty v. Cleveland City Sch. Dist. Bd. of Educ., 690 N.E.2d 1273 [123 Educ. L. Rep. 1270] (Ohio 1998).

[60] Curtis v. Oklahoma City Pub. Sch. Bd. of Educ., 147 F.3d 1200 [127 Educ. L. Rep. 627] (10th Cir. 1998).

[61] Brey v. Board of Educ., 664 N.Y.S.2d 496 [122 Educ. L. Rep. 523] (App. Div. 1997).

Where a teacher in Georgia contested a letter of reprimand issued by her superintendent, a trial court ultimately upheld the inclusion of the letter in her file. On further review, an appellate court dismissed for lack of jurisdiction since state law did not authorize direct appeals when a trial court reviewed an action taken by a local administrative agency.[63]

A second case from Georgia involved a complicated path of appeals to resolve a tangle of procedural issues. Ultimately, an appellate panel reversed and remanded a trial court's judgment on the basis that the record supported the state board of education's ruling that the procedures a county board used in demoting a middle school principal deprived her of due process.[64] The court declared that the chair should have been recused because he was personally involved in criticizing the principal's performance and in seeking her removal.

In the first of two cases about credit for experience and education, a speech pathologist sought a remedy with the state grievance board, claiming entitlement to a year's teaching experience for two part-time positions she had in another state. Although the grievance was denied at all levels, a trial court ordered that the pathologist be given credit for her work experience and appropriate back-pay with interest and benefits. On further review, the Supreme Court of Appeals of West Virginia affirmed not only that the axiom "school personnel regulations and laws are to be strictly construed in favor of the employee" applied but also that state law entitled the speech pathologist to the years of experience that she requested.[65]

A teacher in Kansas filed a grievance against a board of education on the basis that he was entitled to extra pay on the negotiated salary schedule for hours earned after his Bachelor's Degree to qualify for a teaching certificate. When the board denied the teacher's grievance, he filed suit. The board responded that the teacher filed suit too late to satisfy the thirty-day statutory limit for appealing the final action of a quasi-judicial body. An appellate court reasoned that the thirty-day statutory limit did not apply as the board's actions were not quasi-judicial since it was not acting as an impartial body mediating a dispute between contending parties.[66] Even so, the court affirmed a grant of summary judgment for the board in mandating that insofar as the plaintiff was not a teacher at the time he earned the extra hours, he was ineligible for the extra pay based on the terms of the negotiated agreement.

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[62] Broderick v. Board of Educ., Roosevelt Union Free Sch. Dist., 678 N.Y.S.2d 370 [129 Educ. L. Rep. 750] (App. Div. 1998).

[63] Gurley v. Gordon County Bd. of Educ., 498 S.E.2d 64 [125 Educ. L. Rep. 970] (Ga. Ct. App. 1998).

[64] Johnson v. Pulaski County Bd. of Educ., 499 S.E.2d 345 [125 Educ. L. Rep. 1369] (Ga. Ct. App. 1998).

[65] Breza v. Ohio County Bd. of Educ., 497 S.E.2d 548 [124 Educ. L. Rep. 1128] (W. Va. 1997).

Support Staff

A case in Pennsylvania considered the distinction between independent contractors and employees. A township tax collector, who was responsible for collecting taxes for a district, sought further review of the denial of his application to join the state school employee retirement system. An appellate panel, applying the ten-part test established by the state supreme court, affirmed that since the tax collector was an independent contractor, rather than a school employee, he was ineligible to join the retirement system.[67]

In New York, where a substitute groundskeeper was injured when he fell while operating a leaf blower, the term accident was defined. The groundskeeper challenged the state comptroller's denial of his application for accidental disability retirement benefits on the basis that he did not suffer an accident within the meaning of the retirement and social security laws. An appellate court affirmed that an accident is a sudden and extraordinary event that does not result from an activity performed in the course of ordinary employment duties.[68]

At issue in a salary reduction case from Louisiana was a statute, which became effective on July 13, that prohibited a decrease in a school employee's pay to an amount below that of the preceding year. A board adopted a ten percent reduction on April 14, and, when voters rejected a special sales tax proposal on July 18, it approved an additional ten percent reduction on July 27. Two employees successfully filed suit claiming that the board violated the law. On further review, an appellate court affirmed that since the board's action on July 27 was a new proposal, not simply a continuation of the April 14 reduction plan, it violated the statute.[69]

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[66] Schmidt v. Board of Educ., U.S.D. No. 322, 951 P.2d 960 [123 Educ. L. Rep. 1296] (Kan. Ct. App. 1997).

[67] Grogan v. Pennsylvania Pub. Sch. Emp. Retirement Bd., 711 A.2d 558 [126 Educ. L. Rep. 1067] (Pa. Commw. Ct. 1998).

[68] Dooley v. McCall, 675 N.Y.S.2d 396 [128 Educ. L. Rep. 328] (App. Div. 1998).

[69] Netherland v. Concordia Parish Sch. Bd., 716 So. 2d 96 [128 Educ. L. Rep. 1335] (La. Ct. App. 1998).

In a case about employment-at-will that came to state court as a certified question from a federal venue, the Supreme Court of Iowa answered that language in a statute on public employment relations did not negate the common law presumption that public employees are employed at-will.[70] In examining the context in which the proper cause language appeared, the court concluded that the legislature did not intend to establish a just-cause limitation on the right of a public employer to discharge an employee. Rather, the court acknowledged that the legislature's intent was merely to restate the public employer's common law right to dismiss an employee at will for any lawful reason.

The first of two dismissal actions focusing on procedural issues was a case of first impression resolved by the Supreme Court of Arkansas. The court affirmed that under the state's Public School Employee Fair Hearing Act, a board of education must satisfy a standard of substantial compliance, not strict compliance, in proceedings leading to the dismissal of noncertificated employees.[71] Even so, the court upheld the dismissal of a school mechanic who refused to serve as a substitute bus driver.

In the second case, a district clerk sought further review of the dismissal of her wrongful discharge action against a school system where a trial court granted the board's plea for lack of jurisdiction due to the woman's failure to exhaust administrative remedies. On further review, an appellate court in Texas affirmed.[72] The court rejected the clerk's argument that since she had a state constitutional claim, she could bypass administrative remedies just as she could have with a federal claim. The court responded that federal constitutional claims involving only questions of law, not of fact, allow for bypassing exhaustion of remedies insofar as they are federal, not because they are constitutional.

The first of two cases dealing with dismissals to save money resulted in the affirmation of a board's authority. Pursuant to a reallocation of funds, a school board in Oklahoma dismissed non-certificated administrative staff employees who unsuccessfully filed suit claiming that this was contrary to law. On further review, an appellate affirmed that since noncertificated employees had no expectation of continued employment, the dismissal proceedings were lawful insofar as boards have the discretion to redirect financial resources from support staff salaries to other school purposes.[73]

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[70] Lockhart v. Cedar Rapids Comm. Sch. Dist., 577 N.W.2d 845 [125 Educ. L. Rep. 1347] (Iowa 1998).

[71] Small v. Cottrell, 964 S.W.2d 383 [125 Educ. L. Rep. 574] (Ark. 1998).

[72] Janik v. Lamar Consol. Indep. Sch. Dist., 961 S.W.2d 322 [124 Educ. L. Rep. 471] (Tex. Ct. App. 1997).

[73] Isch v. Oklahoma Indep. Sch. Dist. No. 1-89, 963 P.2d 18 [129 Educ. L. Rep. 497] (Okla. Ct. App. 1998).

A second case illustrated the limits of board discretion. Where a board that privatized its school transportation system discharged its bus drivers and mechanics, the employees claimed that it violated their statutory rights. The board responded that it had the right to implement its final offer which set forth the wages and benefits that the employees would have received under the privatized system. An appellate panel granted the board's motion for summary judgment but the Supreme Court of Ohio reversed.[74] After indicating that the collective bargaining agreement, which superseded the continuing contract law, was no longer in effect at the time of the dismissals, the court considered how the employment relationship was governed by statute. The court stated that while the statute on continuing contracts permitted dismissals for specified causes, it did not authorize a board to lay off noncertificated employees for economic reasons.

The relationship between review panels and boards of education was the focus in two cases. When a board discharged a security guard for numerous and serious instances of misconduct and malperformance, he appealed to the state merit system board, which determined that a six-month suspension was more appropriate. On further review, an appellate court in New Jersey reversed in favor of the board in agreeing that the repeated acts of misconduct warranted nothing short of dismissal.[75] Even in pointing out its limited role in reviewing the judgment of an administrative agency, the court found that the merit system board's action went so wide of the mark that it must have made a mistake.

Employees fared better where a board of education dismissed a truck driver and a journeyman painter for violating its drug and alcohol policy. An employee review panel, acting pursuant to the state's fair dismissal act, and a lower court agreed that dismissal was improper since both workers had essentially perfect work histories. As such, the court ordered the reinstatement of the employees after their successful completion of a rehabilitation program. On further review, the Supreme Court of Alabama affirmed that since an employee review panel's consideration of a board's action is de novo, it is fully within the panel's discretion to substitute its judgment for that of the board.[76]

In a case from Pennsylvania, the issue was whether a custodian's invocation of his Fifth Amendment privilege against self-incrimination, in response to questions put to him by an administrator about his use of marijuana, constituted substantial evidence to support his dismissal. Although noting that the Fifth Amendment does not forbid adverse inferences against parties to civil actions if they refuse to testify in response to probative evidence offered against them, the Supreme Court of Pennsylvania overturned the custodian's dismissal.[77] The court asserted that simply invoking such rights, unaccompanied by independent probative evidence of the charged misconduct, does not constitute substantial evidence to support an employee's dismissal.

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[74] State *ex rel* Boggs v. Springfield Local Sch. Dist. Bd. of Educ., 694 N.E.2d 1346 [125 Educ. L. Rep. 1337] (Ohio 1998).

[75] State-Operated Sch. Dist. of Newark v. Gaines, 707 A.2d 165 [124 Educ. L. Rep. 953] (N.J. Super. Ct. App. Div. 1998).

[76] Jefferson County Bd. of Educ. v. Moore, 706 So. 2d 1147 [124 Educ. L. Rep. 1135] (Ala. 1997).

School District Contracts

Goods and Services

A firm that was a disappointed bidder on a school district contract for group vision care filed a protest. After a hearing, the board dismissed the protest based on the recommendation of the hearing officer it appointed. On further review, an appellate court in Florida noted that the hearing examiner's refusal to allow the firm to amend its pleadings at the beginning of the hearing was reversible error since doing so excluded evidence that might have convinced him that the bid award proceedings were materially impaired.[78] Yet, the court added that the board did not err in refusing to recuse itself in its entirety because two members testified at the hearing.

In New York a city board of education informed school bus companies that it would be recouping overpayments resulting from a miscalculation of increases in the amounts to be paid during each year of contract extensions. The increases were based on data for the first year of the extension rather that the last year prior to it, as required by state statute. The bus companies then sued the board unsuccessfully, charging that its behavior was contrary to law. Moreover, insofar as the state department of education reimbursed school districts for a substantial part of transportation expenses, it was joined as a defendant. An appellate panel affirmed that since state law and regulations clearly permitted the use of data from the prior year, the trial court properly dismissed both the bus companies' complaint and board's estoppel defense against the department of education's recoupment of funds paid to the district.[79]

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[77] Harmon v. Mifflin County Sch. Dist., 713 A.2d 620 [127 Educ. L. Rep. 916] (Pa. 1998).

[78] Optiplan v. School Bd. of Broward County, 710 So. 2d 569 [126 Educ. L. Rep. 550] (Fla. Dist. Ct. App. 1998).

[79] AC Transp., Inc. v. Board of Educ. of New York, 678 N.Y.S.2d 603 [129 Educ. L. Rep. 1131] (App. Div. 1998).

Real Estate

In a federal diversity action, a limited partnership brought a breach of contract action against a school district in Wisconsin for failing to purchase a parcel of real estate. The system had changed from a unified to a common school district with the crucial difference that the reorganization took authority to purchase real estate away from the board and gave it to electors. Prior to the reorganization, the board adopted a resolution to purchase the property from the partnership subject to certain conditions. Subsequent to the reorganization, the electors voted to purchase about half of the parcel, an arrangement that was unacceptable to the seller. The federal trial court held that since the resolution did not constitute an acceptance, there was no valid contract. On appeal, the Seventh Circuit affirmed that the school district's objective intent, as reflected in the resolution, was preliminary to an acceptance.[80]

Construction Contracts

A construction company in Pennsylvania unsuccessfully filed a demand for arbitration to recover compensable damages for work it completed on a high school pursuant to a contract signed by the board president without the approval of the board. An appellate court affirmed a stay of arbitration on the ground that since the president's award of the contract lacked the approval of the entire board, it was invalid because it did not conform to statutory requirements.[81]

After the premature deterioration of pavement led to the discovery that a contractor had not installed a foundation course, a school board withheld remaining payments due on the agreement and brought a breach of contract action against both the paving contractor and the issuer of its performance bond. The contractor claimed that subsequent to a conversation with school officials, the foundation course was deleted by addenda to the bid specifications. An appellate court in New York affirmed, but modified, a judgment in favor of the defendants.[82] The court explained that the parties' intention, as derived from the language of the contract, was to have an asphalt foundation course with the addenda simply categorizing two different types of foundation courses as one. In addition, the court offered that the defendant's claims of waiver or estoppel based on the alleged conversation were unavailing; however, insofar as the panel was not satisfied that the district submitted sufficient proof on the issue of damages, it remitted this question to a trial court.

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[80] Perritt Ltd. Partnership v. Kenosha Unified Sch. Dist., 153 F.3d 489 [128 Educ. L. Rep. 1023] (7th Cir. 1998).

[81] Albert Gallatin Area Sch. Dist. v. Penn Transp. Serv., Inc., 704 A.2d 184 [123 Educ. L. Rep. 252] (Pa. Commw. Ct. 1997).

[82] Greater Johnstown Sch. Dist. v. Frontier Ins. Co., 675 N.Y.S.2d 212 [127 Educ. L. Rep. 990] (App. Div. 1998).

Bidding on Construction Contracts

Constitutional rights were at issue in three cases involving disputes over bidding on construction contracts. A non-union mechanical subcontracting firm, along with its employees and estimator took exception to a board's preference that bidders on a school construction project be signatory to a collective bargaining agreement with a labor union. The plaintiff claimed that this practice violated its First and Fourteenth Amendment rights because the board replaced its bid with that of a union subcontractor who had a higher bid. In recognizing that the Constitution protects the freedom not to associate, a federal trial court in Missouri reviewed the board's action using the rational basis test and found in its favor.[83] The court wrote that under state law, a rejected bidder does not have a property interest in a contract award that invokes the protections of procedural due process. The court decreed that insofar as the state bidding law gave the board broad discretion in awarding contracts, the preference for union contractors in the interests of labor peace and timely completion of the project was permissible.

Similarly, in a consolidated appeal, plaintiffs challenged a borough's requirement that successful bidders on a high school construction project enter into a project labor agreement with local unions. The plaintiffs argued that this practice violated the state constitution and the borough's procurement code. On further review, the Supreme Court of Alaska vacated and reversed in part and affirmed in part.[84] The court observed that the project labor agreement did not violate the equal protection rights of non-union workers because there was a close nexus between it and the borough's important interests. The court contended that the agreement did not violate the mandates of the borough's procurement code due to special challenges that this construction project presented.

The third case originated in Louisiana where a contracting firm brought a section 1983 action against a district and its director of facility planning claiming that the board's disqualification of its bid on an electrical project and barring it from bidding on future projects violated its right to due process. A federal trial court in Louisiana denied the director's motion for summary judgment based on qualified immunity. On further review, the Fifth Circuit reversed, holding that the contractor's due process rights were not violated.[85] Although state law extended a contractor a property interest in bidding on future contracts, the school district had provided notice and an opportunity to be heard, which constituted adequate due process protections. Further, the court was of the opinion that due process did not require the board to keep a transcript of the proceedings or give formal written notice before awarding a contract to other bidders. The court reflected that state law provided additional post-deprivation remedies.

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[83] Hanten v. School Dist. of Riverview Gardens, 13 F. Supp. 2d 971 [129 Educ. L. Rep. 325] (E.D. Mo. 1998).

[84] Laborers Local No 942 v. Lampkin, 956 P.2d 422 [126 Educ. L. Rep. 437] (Alaska 1998).

[85] Systems Contractors Corp. v. Orleans Parish Sch. Bd., 148 F.3d 571 [127 Educ. L. Rep. 722] (5th Cir. 1998).

Two bidding cases turned exclusively on questions of state law. An unsuccessful bidder protested the award of a school construction contract on the basis that the lowest bid was legally unresponsive because it listed alternative subcontractors. After a hearing, a master-in-equity denied the protest and lower courts affirmed. On further review, the Supreme Court of South Carolina reversed and remanded.[86] In construing the pertinent statute, the court decided that under the circumstances, listing alternative subcontractors on the bid form was improper since it gave the general contractor an opportunity to engage in post-award bid shopping among subcontractors. Further, the court believed that insofar as a violation was material, the district could not waive it as a minor informality or irregularity.

In a case of first impression from New Jersey, where a school board awarded three of five prime contracts but rebid the other two, an unsuccessful bidder sought to compel the board to award it the contract, claiming that such a bifurcated bidding procedure was contrary to state law.[87] A judge read the statute as requiring all bids to be awarded at the same time or else awards of initially accepted bids had to be held pending rebids. However, as the judge ordered prospective relief, the contracts that were already awarded were allowed to remain in place and the board was permitted to proceed with the rebidding process.

School District Facilities

Access

Constitutional constraints on control of access to school facilities were at issue in three cases, each of which upheld board authority. When a board of education denied a church permission to use school facilities for worship services, the church and its pastor unsuccessfully filed a section 1983 action alleging that the board violated their constitutional rights. Applying constitutional forum analysis in granting the board's motion for summary judgment, a federal trial court in New York observed that school facilities were limited open rather than open public forums by virtue of state law and a board policy prohibiting their use for religious services.[88] The court rejected the plaintiffs' position that the district's denial was an unlawful viewpoint discrimination because it had permitted religious services on two previous occasions. The court reasoned that since the board gave its permission by mistake, it promptly corrected its error while taking steps to make sure that it did not occur again in the future.

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[86] Ray Bell Constr. Co. v. School Dist. of Greenville County, 501 S.E.2d 725 [127 Educ. L. Rep. 452] (S.C. 1998).

[87] Seacoast Builders, Inc. v. Howell Township Bd. of Educ., 718 A.2d 1225 [129 Educ. L. Rep. 1120] (N.J. Super. Ct. Law Div. 1998).

Candidates for election to a school board unsuccessfully sued a district in Illinois. The candidates alleged that the board violated their constitutional rights to freedom of expression and equal protection when it permitted the union representing its teachers to use the system's mail delivery system to distribute materials endorsing three candidates while they were denied such access. On further review, the Seventh Circuit affirmed that insofar as the district's mail delivery system was a nonpublic forum, affording the union that represented its teachers access to the system was rationally related to efficient school governance.[89]

Where a sports reporter for a local newspaper attempted repeatedly to initiate unwanted personal contacts with two female coaches, a district barred him from school premises and from attending games. However, the district still allowed the reporter to call the school to obtain information. When the reporter was discharged by his employer, he filed suit against the district, alleging violations of various constitutional rights. A federal trial court in New York granted the district's motion for summary judgment.[90] The court was of the opinion that the district's barring the reporter did not violate any rights to freedom of the press, freedom of speech, freedom of association, or due process.

In a case involving a mix of constitutional and statutory questions, an African-American parent who was dissatisfied with her fifth-grade son's treatment received written permission from the principal to monitor one of his classes on a day that he was absent. The mother was permitted to sit in on the class for one hour, after which time she was asked to leave. When the mother refused to leave, the counselor in charge of the building called the police who arrested her on charge of criminal trespass. This charge was eventually dropped. Subsequently, the woman and her husband unsuccessfully sued the board, city, police, and others. In granting the defendants' motion for summary judgment, a federal trial court in Texas commented that the board's disagreement with the mother's point of view did not violate her right to free speech and that its purported interference with her attempt to monitor the class did not violate her constitutional right to direct the education of her son.[91] The court further noted that under the circumstances, the police officer had probable cause to arrest the mother, the mother failed to present evidence that school personnel sought to have her arrested due to her race, and that the false imprisonment claim against city and board lacked merit because they were protected by sovereign immunity.

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[88] Full Gospel Tabernacle v. Community Sch. Dist. 27, 979 F. Supp. 214 [122 Educ. L. Rep. 441] (S.D.N.Y. 1997).

[89] Davidson v. Community Consol. Sch. Dist. 181, 130 F.3d 265 [122 Educ. L. Rep. 583] (7th Cir. 1997).

[90] Hone v. Cortland City Sch. Dist., 985 F. Supp. 262 [123 Educ. L. Rep. 605] (N.D. N.Y. 1997).

A criminal case from Washington involved an intruder who was convicted of second degree burglary after he was caught in a classroom with his hand on a teacher's jacket. The burglar sought further review of his conviction on the ground that he could not be guilty of the offense as defined by statute because entry into a public school classroom was lawful. An appellate court affirmed in declaring that the burglar's freedom of movement could reasonably have been limited by school policies that were necessary for the protection of children and that his argument that he had free access in the public schools was without merit.[92] The court also stated that since the evidence supported both unlawful entry and criminal intent, the elements of second degree burglary were met.

Miscellaneous Issues

In Pennsylvania, a board of education challenged a township zoning board's denial of its request for a special exception to build a middle school. An appellate court affirmed that while the district gave evidence that the proposed use of the property was for a school, it made no attempt to comply with the more specific requirements necessary to obtain a special exception.[93]

A drywall subcontractor who was not paid for all work done sued the general contractor for breach of contract and the school board for failure to obtain a bond as required by state law. After a trial court in Missouri denied the subcontractor's motion for directed verdict and judgment notwithstanding the verdict against the district, an appellate panel affirmed. The court asserted that there was sufficient evidence to sustain the jury's finding for the school board that there was a valid surety.[94] In any event, the court pointed out that the board was covered by official immunity insofar that obtaining a bond is a ministerial duty. Thus, determining whether the bond is good and sufficient is a discretionary act that is so protected.

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[91] Ryans v. Gresham, 6 F. Supp. 2d 595 [127 Educ. L. Rep. 862] (E.D. Tex. 1998).

[92] State v. Allen, 955 P.2d 403 [125 Educ. L. Rep. 925] (Wash. Ct. App. 1998).

[93] Council Rock Sch. Dist. v. Wrightstown Township Zoning Hearing Bd., 709 A.2d 453 [125 Educ. L. Rep. 729] (Pa. Commw. Ct. 1998).

[94] George Weis Co. v. Dwyer, 956 S.W.2d 335 [122 Educ. L. Rep. 1060] (Mo. Ct. App. 1997).

In New Jersey, a real estate developer sued a board of education and its members individually, claiming that he was harmed by one member's opposition to a housing development. An appellate tribunal affirmed in part, reversed in part, and remanded.[95] The court indicated that since there were no clear contentions of wrongdoing against the board member, who simply spoke out against the development, there could be no claim against the board for not preventing the member's opposition. As such, the court agreed that the counts against the individual and the board were correctly dismissed. However, the court found that the developer's claims that the board violated the right to know statute by refusing to produce certain records and that he had a common law right to examine these writings were viable charges that should not have been dismissed. Finally, the panel ordered the trial court to reconsider its award of counsel fees under the frivolous claims law.

School District Transportation

Where a state statute required public school districts to provide the same kind of transportation services for its children who attend nonpublic nonprofit schools as for those attending public schools, parents whose children attended parochial schools challenged a board's refusal to provide transportation services on days when public schools were not in session. The state board of education ruled in favor of the parents and a lower court affirmed. On further review, the Supreme Court of Connecticut also affirmed that the statute required districts to provide safe and reliable transportation services to children who attended private schools on days when public schools were not in session.[96] The court added that providing such services to these school students would not violate either the Establishment Clause or the state constitution.

Student Claims of Mistreatment

Parents in Texas filed a section 1983 action alleging that a district and various employees were liable for their son's death from heat exhaustion during a high school football practice. A federal trial court granted the defendants' motion to dismiss individuals who were sued in their official capacities.[97] The court refused to dismiss charges against those who were sued in both their official and personal capacities and the district. More specifically, the court concluded that the Constitution protects a child from deprivation of his life caused by the callous indifference of public school employees, that the parents alleged sufficiently egregious facts to preclude dismissal of this constitutional claim, that their allegations were sufficiently detailed to meet the requirement of pleading an official policy that they stated a cause of action against the district, that their allegations were sufficiently specific to state a claim against the football coaches and trainer, and that they sufficiently alleged the violation of a clearly established constitutional right so as to avoid dismissal of the coaches and trainer on the grounds of qualified immunity.

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[95] Lake Lenore Estates Assoc. v. Township of Parsippany-Troy Hills Bd. of Educ., 712 A.2d 200 [127 Educ. L. Rep. 342] (N.J. Super. Ct. App. Div. 1998).

[96] Board of Educ. of Stafford v. State Bd. of Educ., 709 A.2d 510 [125 Educ. L. Rep. 1248] (Conn. 1998).

[97] Roventini v. Pasadena Indep. Sch. Dist., 981 F. Supp. 1013 [122 Educ. L. Rep. 998] (S.D. Tex. 1997).

Tort Liability

Defamation

An elementary school principal sued her superintendent, alleging that he defamed her by making comments about her use of questionable disciplinary techniques and that he violated her constitutional rights based on other actions. The principal subsequently sought further review when a trial court dismissed her action for failure to provide the superintendent with statutory notice. The Supreme Court of Mississippi reversed and remanded in favor of the principal.[98] The court offered that although the notice provision applied to state tort actions against a government employee in an official capacity, the superintendent was not covered by statutory immunity when he stepped outside of the scope of his job by speaking with the media rather than resolving the situation internally.

Negligence

The father of a freshman player who was attacked and beaten by other members of a Georgia high school football team sued the board, the principal, and the coach. After a trial court granted two employees' motions for summary judgment based on official immunity, the father sought further review. An appellate court affirmed that since supervision of student safety is a discretionary function, the proper exercise of which entitles school officials to immunity, and the evidence did not show that the principal or coach acted with actual malice or with actual intent to cause injury, they did not lose this defense against liability.[99]

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[98] McGehee v. DePoyster, 708 So. 2d 77 [125 Educ. L. Rep. 246] (Miss. 1998).

[99] Caldwell v. Griffin Spalding County Bd. of Educ., 503 S.E.2d 43 [128 Educ. L. Rep. 904] (Ga. Ct. App. 1998).

A student who was injured in a fight with other pupils filed suit for damages against a school board and its employees, claiming that the principal and the nurse acted wrongfully. An appellate court in Ohio affirmed a grant of summary judgment based on statutory immunity.[100] The court noted that the complaint failed to set forth facts showing that the employees' actions constituted reckless or wanton misconduct or bad faith so as to lose their immunity. Moreover, the court was convinced that insofar as the actions of the employees involved the exercise of discretion, the board, as a political subdivision, was immune from suit.

Claims and Suits Against the School District

Standing

Parents and others challenged the legality of an agreement between a board and a private high school under which the latter was to provide an alternative education program for students from the former. After a trial court granted the defendants' motion to dismiss on the ground that the parents lacked standing, they sought further review. An appellate court in Indiana affirmed that the parents failed to demonstrate any direct injury that was required for either private or public standing.[101]

Notice

The following cases turned on the filing of a claim with a school district or state agency pursuant to state statutory requirements. A former student who alleged that she was sexually mistreated by a teacher filed a complaint against her school district, alleging negligence and civil rights violations. In rejecting the action as time-barred, a trial court granted the district's motion for summary judgment. On further review, the Supreme Court of Idaho affirmed that the student failed to give the district timely notice of her tort claim and that her section 1983 claim was barred by the state's two-year statute of limitations for personal injury actions.[102]

In the first of three cases from New York, a school board challenged the denial of its motion for summary judgment in a suit filed by a bus corporation that sought to recover payment for services rendered. Reversing in favor of the board, an appellate court held that since the bus corporation failed to comply with state law by filing verified notices of claim about the disputed invoices prior to bringing suit, the invoices did not constitute proper notice of claim.[103]

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[100] Cook v. Hubbard Exempted Village Bd. of Educ., 688 N.E.2d 1058 [122 Educ. L. Rep. 1275] (Ohio Ct. App. 1996).

[101] Fort Wayne Educ Ass'n v. Indiana Dept. of Educ., 692 N.E.2d 902 [125 Educ. L. Rep. 199] (Ind. Ct. App. 1998).

[102] Osborn v. Salinas, 958 P.2d 1142 [127 Educ. L. Rep. 444] (Idaho 1998).

A school employee sued the state retirement system, challenging the comptroller's denial of his application for retroactive benefits. The employee alleged that the board did not properly notify him of the opportunity to become part of the retirement system when he was hired and that he only learned that he could do so several months later at which time he could join only under less favorable terms. When a trial court denied the employee's filing suit for failing to serve a notice of claim on his district, he sought further review. An appellate court in New York reversed in favor of the employee.[104] The court explained that the district had adequate notice of and participated in the proceedings leading to the denial and that its testimony was insufficient to support its claim that the employee was aware of his option to join the retirement system.

When a school board in New York denied a former teacher's retroactive membership in the state retirement system, she sought further review. After a trial court entered a judgment in favor of the teacher, an appellate panel reversed.[105] Although rejecting the board's argument that a notice of claim was a condition precedent to petitioner's commencement of the proceeding, the court acknowledged that on the merits, the former teacher was ineligible for retroactive membership.

Conclusion

The cases reported in this chapter address a wide array of school governance issues. As would be expected, most of the litigation involved questions of state law that were resolved by state courts. However, some of the disputes addressed issues of federal law that were decided in the federal courts. Accordingly, a review of the preceding litigation does provide insight into the nature of the legal controversies that arose over the governance of public education and how they were resolved by the judiciary.

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[103] Bronco Bus Corp. v. Yonkers Bd. of Educ., 672 N.Y.S.2d 920 [126 Educ. L. Rep. 368] (App. Div. 1998).

[104] De Meurers v. New York State and Local Employees' Retirement Sys., 672 N.Y.S.2d 474 [126 Educ. L. Rep. 357] (App. Div. 1998).

[105] Lovett v. Manhasset Pub. Schs., 666 N.Y.S.2d 654 [123 Educ. L. Rep. 812] (App. Div. 1997).

3
PUPILS

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Introduction

Federal and state courts continue to be called upon to define the balance between students' rights and the mandate that schools provide safe, orderly educational environments for diverse student bodies. While challenges regarding the sexual harassment of students continue to focus on fault, the courts are placing greater emphasis on holding perpetrators culpable as long as school officials take affirmative remedial steps. Cases concerning search and seizure continue to reach varying results as do those on complex and controversial First Amendment and desegregation issues. This chapter examines the many issues that the courts are asked to review concerning students and schools.

Issues Relating to Public School Attendance

Compulsory Attendance

Where a fourteen-year-old girl put rat poisoning in the drink of a boy who sexually harassed her, she was adjudicated delinquent and committed to the state department of correction. Further, the student was ordered into the custody of her aunt and told to attend school regularly. When the student was expelled for one semester, the court agreed to her aunt's request to order her reinstatement. Even though the district appealed, the Supreme Court of Indiana heard the case after the expulsion was over because it involved a matter of great public concern.[1] The court asserted that although it lacked jurisdiction to decide the petition filed by the student's guardian, it had the authority to hear the chief probation officer's motion for injunctive relief.

In a second case from Indiana, a mother who was convicted of neglect of a dependent and failure to ensure that her children attended school sought further review. An appellate court in Indiana reversed, holding that the school's notification to the mother by mail about the children's absences without additional support was insufficient evidence upon which to base a conviction.[2] The court decided that the state made no effort to show that the absences harmed the students' education and acquisition of knowledge.

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[1] West Clark Community Schs. v. H.L.K., 690 N.E.2d 238 [123 Educ. L. Rep. 894] (Ind. 1997).

[2] Hamilton v. State, 694 N.E.2d 1171 [125 Educ. L. Rep. 1334] (Ind. Ct. App. 1998).

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High school students brought a civil rights action and moved for certification as a class while seeking a preliminary injunction to prevent their required participation in a Work Experience Program as a condition of receiving Safety Net public assistance for themselves and their families. In agreeing that the program violated the students' state constitutional right to an education, a trial court in New York granted their request for a preliminary injunction by declaring that they adequately represented their class members for class certification.[3]

In Wisconsin, a fifth grade student who was absent from school without an excuse for fifteen days, seven of which were due to a suspension, challenged his adjudication as an habitual truant in need of protection and services. An appellate court affirmed that since a suspension was not one of the seven accepted reasons for excused absences, the plain language of the statute made it clear that the student was a truant.[4]

A home schooled student and her parents in Oklahoma sued a school board and various officials alleging that their refusal to allow her to attend classes on a part-time basis violated the child's rights under the Free Exercise Clause as well as the parents' right to direct the student's education. When the federal trial court granted the board's motion for summary judgment, the plaintiffs appealed. The Tenth Circuit affirmed that the policy against part-time attendance neither violated the student's right to free exercise of religion nor did it infringe upon the parents' right to direct their daughter's education.[5] The court also reasoned that the plaintiffs were not entitled to an exception from policy on the basis of their religion.

Transfer of Students

A city school district sought further review of the denial of its request to enjoin a suburban system from accepting students who lived within its boundaries and from requesting state aid for these children. An appellate court in Michigan reversed in favor of the city district in observing that the suburban system could neither operate within the geographical boundaries of the city nor request state aid for the students without the city's approval.[6] The court commented that while the state allows students to attend schools of choice outside of the districts within which they live, there is no indication that it allows further abrogation of local control.

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[3] Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757 [128 Educ. L. Rep. 834] (Sup. Ct. 1998).

[4] In Interest of Isaac J.R., 582 N.W.2d 476 [128 Educ. L. Rep. 367] (Wis. Ct. App. 1998).

[5] Swanson by and through Swanson v. Guthrie ISD I-L, 135 F.3d 694 [123 Educ. L. Rep. 1087] (10th Cir. 1998).

[6] Detroit Bd. of Educ. v. Romulus Bd. of Educ., 575 N.W.2d 90 [124 Educ. L. Rep. 693] (Mich. Ct. App. 1997).

Where a high school student enjoined an athletic association from enforcing its transfer rule against him, the organization sought further review. The Supreme Court of Indiana vacated in favor of the association on the basis that the rule was neither arbitrary nor capricious as it advanced a legitimate goal of the organization.[7] The court concluded that since the possibility of receiving a scholarship is not a property interest, the student did not have a constitutionally protectable right to participate in interscholastic athletics.

Tuition and Fees

A middle school student sought to compel a district to admit him on a tuition-free basis. Even though the student moved to Illinois to reside with his aunt who met all of his needs, the board claimed that she was not his legal guardian. After a trial court ordered the district to admit the student, the district sought further review. An appellate court affirmed that the student was a bona-fide resident whose move into the district was not solely for educational purposes.[8]

The District of Columbia Public Schools sought to charge a parent tuition for her son's attendance at one of its elementary school districts because the parent, the district claimed, lived in Maryland. The mother responded that the child lived with her parents within the district at the time of his enrollment. In stating that a hearing officer's findings were deficient and that the district did not follow its own procedures for review, an appellate court remanded for further review.[9]

Private and Parochial Students

Where state law required public school districts to provide the same kind of transportation services for children who attend nonpublic schools as for those in public schools, parents whose children attended religiously affiliated schools challenged a board's refusal to provide transportation services on days when the public schools were not in session. After the state board of education ruled in favor of the parents, a lower court affirmed. On further review, the Supreme Court of Connecticut affirmed that the statute required districts to provide safe and reliable transportation services to children who attended private schools on days when public schools were not in session.[10] The court added that providing such services to these students would not violate either the Establishment Clause or the state constitution.

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[7] Indiana High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222 [125 Educ. L. Rep. 821] (Ind. 1997).

[8] Joel R. v. Board of Educ., 686 N.E.2d 650 [122 Educ. L. Rep. 508] (Ill. App. Ct. 1997).

[9] Braddock v. Smith, 711 A.2d 835 [127 Educ. L. Rep. 335] (D.C. 1998).

Where parents alleged sexual abuse of a kindergarten child by the principal of a Catholic school, the Supreme Court of Louisiana reversed a directed verdict in favor of the Archdiocese of New Orleans.[11] The court rejected the Archdiocese's argument that the school was the employer. The court found that there was evidence of an employment relationship between the principal and the Archdiocese. The court ordered a trial.

Parents in Pennsylvania whose children were expelled from a religiously affiliated elementary school sought further review of the denial of their claims of negligence and intentional infliction of emotional distress against the principal and diocese. The parents claimed that their children were expelled without cause because they objected to the approved curriculum rather than for disciplinary problems. An appellate tribunal, even in determining that the trial court lacked subject matter jurisdiction over the claims, affirmed in favor of the defendants.[12]

A student in New York unsuccessfully sued her Catholic high school and others for alleged sexual abuse by a teacher. A federal trial court dismissed on the basis that the student could not file a title IX claim against the Catholic school, her teacher, and the religious order that operated the school since they did not receive federal funding.[13] The court also dismissed a claim against the local public school district which placed a counselor at the school site.

In Alabama, a student unsuccessfully sued his military academy alleging that he had been sexually molested by one of its employees. A trial court held the school could not be responsible since it had no knowledge of the alleged wrongful acts that occurred off its property until after the acts were committed. An appellate court affirmed that the student failed to produce substantial evidence of negligent supervision supporting liability on the theory of respondeat superior.[14]

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[10] Board of Educ. v. State Bd. of Educ., 709 A.2d 510 [125 Educ. L. Rep. 1248] (Conn. 1998).

[11] Doe v. Parauka, 714 So. 2d 701 [128 Educ. L. Rep. 526] (La. 1998).

[12] Gaston v. Diocese of Allentown, 712 A.2d 757 [127 Educ. L. Rep. 354] (Pa. Super. Ct. 1998).

[13] Buckley v. Archdiocese of Rockville Centre, 992 F. Supp. 586 [125 Educ. L. Rep. 88] (E.D.N.Y. 1998).

[14] Anonymous v. Lyman Ward Military Academy, 701 So. 2d 25 [122 Educ. L. Rep. 352] (Ala. Civ. App.1997).

After parents objected to parts of the human sexuality curriculum in the religious school that their children attended, the school refused to accept the children for the following school year. The parents succeeded in obtaining an injunction ordering the school to allow the students to complete the current academic year and to save spaces for them for the next year. On further review, an appellate court in Florida reversed in favor of the school.[15] The court decreed that since the contract between the school and parents was for personal services, it was not enforceable by an injunction.

Substantive Rights of Students

First Amendment: Religious Rights

Aware of case law suggesting that a total prohibition against the distribution of religious materials in public schools is unconstitutional, a board of education in West Virginia revised its policy to allow passive distribution by permitting constituents to make religious materials available on a table one day each year, accompanied by a disclaimer stating the district was not endorsing the material. Even so, a group unsuccessfully challenged the policy on the ground that it violated the Establishment Clause. On further review, the Fourth Circuit affirmed in part but reversed as to elementary schools as it was especially concerned about impressionable young children.[16] Insofar as the secondary schools were concerned, the court noted that the board's allowance of at least limited access to the open forums it created for speech was consistent with its educational mission of affirming the right of religious speakers to use them on equal terms with others. The court ascertained that since the board allowed other groups, including the Little League, Girl Scouts, 4-H, and other groups to distribute information in this manner, the denial of such access would have demonstrated an impermissible hostility toward religious speech.

Students in Idaho challenged the constitutionality of a graduation exercise policy that allowed graduates, based on class standing, to give uncensored presentations including addresses, poems, readings, songs, musical presentations, or prayers of their choice. A trial court upheld the policy since it had a secular purpose, neither advanced nor inhibited religion, and did not create excessive governmental entanglement with religion.[17] On further review, the Ninth Circuit affirmed that the policy did not facially violate the Establishment Clause.[18] The court indicated that the absence of school control prevented the policy from being facially unconstitutional since the students, not clergy, made the presentations. Further, the court was satisfied that the policy was acceptable not only because the speakers were selected using the secular and neutral criteria of academic performances but also since they had autonomy over the content of the speeches.

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[15] Glass v. Anderson, 704 So. 2d 697 [123 Educ. L. Rep. 425] (Fla. Dist. Ct. App. 1997).

[16] Peck v. Upshur County Bd. of Educ., 155 F.3d 274 [129 Educ. L. Rep. 77] (4th Cir. 1998).

[17] Doe v. Madison Sch. Dist. No. 321, 7 F. Supp.2d 1110 [128 Educ. L. Rep. 155] (D. Idaho 1997).

A Jewish student in Utah appealed the dismissal of her suit that claimed her music teacher and others violated her rights under the federal and state constitutions based on his choice of Christian religious music and sites for performing the music. The Tenth Circuit, in affirming and remanding, denied the student's request for relief as her claims were moot.[19] The panel added that the trial court erred in exercising jurisdiction over the state constitutional claims.

In the first of three rulings in the same case, a federal trial court in Alabama entered a permanent injunction to prevent a school board from permitting religious activity in the schools.[20] The court maintained that prayer conducted over the school's public address system violated the First Amendment, regardless of whether it was student-initiated, and that the state statute providing for voluntary student prayers was unconstitutional. Further, the court enjoined the distribution of Bibles to students in their classroom and the practice of asking children to volunteer to lead prayer. However, the court did permit the Bible to be studied as an academic subject. Turning to the next dispute, the court was of the opinion that student-led prayers at high school football games and student-led devotionals that contained prayers violated the First Amendment.[21] The court also remarked that classroom prayers violated the First Amendment, even when led by students and that the distribution of Bibles in home rooms by outside persons contravened the First Amendment. Finally, the court struck down a state statute on prayer as unconstitutional and permanently enjoined a policy that would have allowed students to engage in quiet religious activity during noninstructional time as long as it did not attract too much attention.[22]

An elementary school student and his mother sued a board of education and others for allegedly violating his rights by failing to either exercise supervisory powers or implement policy to allow for the expression of religious beliefs in the classroom. On the defendants' motions for judgment on the pleadings, the federal trial court in New Jersey offered that the board did not deny the student his constitutional right to freedom of expression or violate the Establishment Clause by changing the location of his poster of Jesus and by preventing him from reading children's Bible stories to his classmates.[23] In addition, the court contended that the mother had standing as her son's guardian to sue the commissioner.

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[18] Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 [127 Educ. L. Rep. 607] (9th Cir. 1998).

[19] Bauchman v. West High Sch., 132 F.3d 542 [122 Educ. L. Rep. 1133] (10th Cir. 1997), *cert. denied* 118 S. Ct. 2370 (1998).

[20] Chandler v. James, 985 F. Supp. 1068 [123 Educ. L. Rep. 726] (M.D. Ala. 1997).

[21] Chandler v. James, 985 F. Supp. 1094 [123 Educ. L. Rep. 752] (M.D. Ala. 1997).

[22] Chandler v. James, 998 F. Supp. 1255 [126 Educ. L. Rep. 736] (M.D. Ala. 1997).

Where a school board adopted a two-semester Bible history course, with time equally divided between the Old and New Testaments, even though it already had a comparative religion class, opponents sought to enjoin the classes from being taught. A federal trial court in Florida denied the injunction for the Old Testament class but granted one as to the New Testament course based on its belief that the plaintiffs were likely to prevail on the merits of their claim that it violated the Establishment Clause.[24]

Parents of students who refused, on religious grounds, to take the Kentucky Instructional Results Information System (KIRIS), examinations that are part of a state-wide assessment program to ensure school accountability, unsuccessfully sought a declaratory judgment that having to take the test violated a variety of their rights. Subsequently, an appellate court affirmed that requiring students to submit to KIRIS did not violate the Hatch Amendment to the Family Educational Rights and Privacy Act, the Establishment Clause, a similar state law, or the parents' right to direct the education and upbringing of their children.[25]

Where a trial court decided that a proposed school prayer initiative was not a proper subject for a voter initiative, it granted the objectors motion for summary judgment. On further review, the District of Columbia Court of Appeals affirmed that pre-election review of the initiative was warranted as it violated the First Amendment.[26]

First Amendment: Freedom of Speech

Parents of public high school students in Massachusetts unsuccessfully sued a town, members of the school committee, and other officials alleging that they violated the federal constitutional rights of their children when the school's newspaper and yearbook refused to print advertisements promoting sexual abstinence. On appeal, and *en banc* the First Circuit affirmed that the refusal of student editors to run the advertisements did not constitute state action.[27]

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[23] C. H. v. Oliva, 990 F. Supp. 341 [124 Educ. L. Rep. 890] (D.N.J. 1997).

[24] Gibson v. Lee County Sch. Bd., 1 F. Supp.2d 1426 [127 Educ. L. Rep. 85] (M.D. Fla. 1998).

[25] Triplett v. Livingston County Bd. of Ed., 967 S.W.2d 25 [126 Educ. L. Rep 528] (Ky. Ct. App. 1997).

[26] Committee for Voluntary Prayer v. Wimberly, 704 A.2d 1199 [123 Educ. L. Rep. 776] (D.C. 1997).

A mother filed suit on behalf of her son alleging that a school board and district officials violated his First Amendment and due process rights by requiring him to refrain from wearing a jacket made to look like Confederate battle flag. A federal trial court in South Carolina granted the defendants' motion for summary judgment.[28] The court explained the educators had a reasonable basis for thinking that allowing the student to wear his jacket would likely have resulted in another substantial disruption at school and that the suspension did not violate his First Amendment rights.

In the continuation of a suit involving the hazing of a football player who was grabbed after coming out of a shower, tied to a towel rack, and exhibited to a girl he had dated, a federal trial court in Utah rejected the student's First Amendment claim that he was punished and removed from the team for his refusal to apologize to the team after making public statements about the incident. The court wrote that there was no connection between the student's speech and his removal from the team.[29]

Sexual Abuse and Harassment by Students

The mother of an elementary school student sued the board and various officials alleging that they violated section 1983 and title IX when her daughter was sexually harassed by other children as she rode a school bus. Yet, after each of the instances, which occurred over a three year period, administrators disciplined the offending students. A federal trial court in Missouri granted the board's motion for summary judgment on the section 1983 claim but ordered a jury trial on the title IX claim. After the jury awarded the girl $5,000, the court granted the board's motion for judgment as a matter of law acknowledging that it could not reasonably have reached the judgment that the board was liable for intentionally discriminating against the girl. On appeal, the Eighth Circuit affirmed that the evidence was insufficient to support the girl's claims.[30]

Two former middle school students brought claims under title IX, section 1983, and state law for sexual harassment by a male classmate. The girls alleged that the boy exhibited his genitalia, touched them on their legs and breasts, exhibited lewd pictures, and made obscene remarks. The girls reported the acts to an assistant principal who began an investigation but moved to a different district before completing the investigation. After the girls' parents reported the issue to the superintendent, the board offered staff development on sexual harassment to employees. A federal trial court in New Hampshire rejected the board's motion for summary judgment as questions of material fact remained concerning its knowledge of the harassment and whether it took appropriate action to protect the girls.[31] However, the court was of the opinion that the board did not have an affirmative duty under the Due Process Clause to protect the females from student-on-student sexual harassment and that the mother who was involved in the suit lacked standing to bring the title IX claim in her own right.

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[27] Yeo v. Town of Lexington, 131 F.3d 241 [122 Educ. L. Rep. 924] (1st Cir. 1997).

[28] Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp 488 [124 Educ. L. Rep. 85] (D.S.C. 1997).

[29] Seamons v. Snow, 15 F. Supp.2d 1150 [129 Educ. L. Rep. 642.] (D. Utah 1998).

[30] Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776 [125 Educ. L. Rep. 388] (8th Cir. 1998).

In the first of two cases from New York, a sixth grade student who was raped by acquaintances after she left a park where a class field trip took place challenged an appellate court judgment that the school board was not liable for her injuries. The Court of Appeals of New York reinstated a jury verdict in favor of the student.[32] The court pointed out that the board was liable since there was sufficient evidence supporting the jury's verdict that rape was a foreseeable result of the danger created by the school's failure to have adequate supervision on the outing.

A board sought further review of the denial of its motion for summary judgment in a suit filed on behalf of a student who was sexually assaulted by classmates while using a school lavatory. Even though the girl reported the incident to the guidance counselor and principal, the latter waited five days to review the facts. An appellate court in New York reversed in favor of the board on the basis that the assault was not foreseeable.[33]

Sexual Abuse and Harassment by Employees

In the first of five cases from Texas, a male teacher had sexual relations with a female high school student who did not report the relationship to school officials. A police officer discovered the couple engaging in sexual relations off school grounds and arrested the teacher. Subsequently, the board fired the teacher and the state education agency revoked his teaching license. Yet, as the board failed to distribute an official procedure for lodging a sexual harassment complaint or a formal anti-harassment policy as required by federal policy, the student and her parents unsuccessfully sued based on title IX. A federal district court granted summary judgment to the school district, and the student appealed. The Fifth Circuit affirmed that the board was not vicariously liable based on the common-law agency theory that the teacher's employment status aided in the sexual harassment since the school was not aware of the relationship.[34] On further review in *Gebser v. Lago Vista Independent School District,*[35] the Supreme Court affirmed that there was no private right of action for monetary damages when a teacher engages in a sexual relationship with a student if a board lacks actual notice and is not deliberately indifferent. Even in recognizing the harm to the student and that the teacher's reprehensible behavior undermined the basic purposes of the educational system, the court asserted that its did not affect any right of recovery from the district under state law or from the teacher under section 1983 or state law.

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[31] Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467 [125 Educ. L. Rep. 69] (D.N.H. 1997).

[32] Bell v. Board of Educ. of City of New York, 665 N.Y.S.2d 42 [122 Educ. L. Rep. 1031] (1997).

[33] Schrader By Schrader v. Board of Educ., 671 N.Y.S.2d 785 [125 Educ. L. Rep. 789] (App. Div. 1998).

Where a teacher who molested two third grade students was convicted of indecency to children, their parents unsuccessfully sued the board and principal alleging violations of section 1983 and title IX. A federal district court in Texas granted the defendants' motion for summary judgment on the title IX claim, dismissed the section 1983 charge, and stated that the principal had qualified immunity. On appeal, the Fifth Circuit affirmed with regard to section 1983 and qualified immunity,[36] but remanded as to title IX based on *Oncale v. Sundowner Offshores Services, Inc.*[37]

Parents of elementary students in Texas sued a teacher, principal, and school district alleging sexual abuse along with a variety of federal and state claims where the teacher draped his arm over the shoulders of girls and let his hand touch their upper chest. As soon as the principal learned of these acts, he placed the teacher on leave and the board did not renew his contract. A federal trial court granted motions for summary judgment in favor of the board and principal on all claims while doing the same for the teacher on the equal protection and title IX charges.[38] The court denied the teacher's motion for summary judgment on the substantive due process claim and state charges for infliction of emotional distress, assault, and battery.

An elementary school student and her mother sued a school district alleging officials were deliberately indifferent where a substitute teacher sexually molested the student. The case was complicated because the substitute teacher had sexually molested other children while previously working for the district. Although a principal had reported the incident to Child Protective Services, he did not notify the superintendent about the incident. As such, a federal trial court in Texas denied the board's motion for summary judgment as there were unresolved material facts as to whether it had a policy on reporting such behavior.[39]

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[34] Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 [125 Educ. L. Rep. 1074] (5th Cir. 1997).

[35] 118 S. Ct. 1989 [125 Educ. L. Rep. 1055] (1998).

[36] Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211 [128 Educ. L. Rep. 1006] (5th Cir. 1998).

[37] 118 S. Ct. 998 (1998).

[38] Doe v. Beaumont I.S.D., 8 F. Supp.2d 596 [128 Educ. L. Rep. 215] (E.D. Tex. 1998).

Where a student accused a coach of sexual misconduct, an investigation resulted in his pleading guilty to a charge of criminal indecency with a child. During the investigation, two other teachers called a staff meeting urging colleagues to write letters of support for the coach and to make statements against the student. Consequently, the student charged the teachers with slander for calling him a gang member, liar, drug user, and openly questioning the stability of his family. The student also sued the district, state teacher association, and the two participating teachers for slander, invasion of privacy and violations of title IX. After claims against the board were dismissed in an earlier action, a federal trial court granted the teachers' associations' motion for summary judgment since the association neither authorized the teachers to act nor ratified their actions.[40] The court concluded by refusing to hear the remaining state claims against the teachers while remanding the suit to an appropriate state venue.

In the first of two cases from Indiana that reached the Seventh Circuit, a school district and educators challenged the denial of their motion for summary judgment where a former student sued them and the teacher with whom she had had an affair. The Seventh Circuit reversed and remanded in holding that the principal and assistant principal were not proper defendants under title IX and that the district could not be held liable under title IX on the basis of agency principles. [41] The court also ruled that the teacher's harassment of the student was discrimination on the basis of sex under title IX.

A student in Indiana sued her school district and a former junior high school employee alleging sexual harassment and/or abuse in violation of title IX. The jury returned a verdict in favor of the student, but awarded her nothing in compensatory and punitive damages. A federal trial court in Indiana denied the student's motion for a new trial. The Seventh Circuit reversed and remanded in favor of the student.[42] As a matter of law,

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[39] Mirelez v. Bay City Indep. Sch. Dist., 992 F. Supp. 916 [125 Educ. L. Rep.111] (S.D. Tex. 1998).

[40] Schrum v. Land, 12 F. Supp.2d 576 [129 Educ. L. Rep. 165] (S.D. Tex. 1997).

[41] Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014 [122 Educ. L. Rep. 48] (7th Cir. 1997).

[42] Mary M. v. North Lawrence Community Sch. Corp., 131 F.3d 1220 [122 Educ. L. Rep. 980] (7th Cir. 1997).

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the appellate panel observed that the thirteen-year-old girl, who was considered an elementary school student under state law, could not welcome advances of a twenty-one-year-old employee and that submission of the welcomeness issue prejudiced the jury.

Where a student in Oregon was allegedly sexually abused by a janitor, she and her mother sought further review of the dismissal of her section 1983 and tort claims suit against the district and janitor. The Ninth Circuit affirmed that the dismissal was proper since the plaintiffs did not give actual and timely notice of their claim under the Tort Claims Act.[43] Further, the court posited that the district was not liable for abuse under section 1983.

A sixth grade student sued her school board and district officials, including her teacher, for violations of equal protection, due process, and title IX, alleging that they were responsible for permitting sexual harassment by a student teacher and boys in her class. The suit claimed that school officials failed to remedy inappropriate conduct by the student teacher and her male classmates. When a federal trial court in California denied school officials' claims of qualified immunity, they appealed. The Ninth Circuit affirmed that since the rights of the female students were clearly established under the Equal Protection Clause and title IX, the trial court was correct in denying the motion for qualified immunity.[44]

In a second case from California, a school board challenged its liability for more than $4,000,000 to two students who were sexually molested by a teacher who had been reprimanded several times for inappropriate actions involving students during an eighteen-year period. One student brought charges against the teacher alleging he placed his hand under her sweater and touched her breast. She later recanted, leading the teacher to file defamation charges. The insurance company representing the student's parents settled for $50,000. However, after a second student sued four years later, the teacher entered a plea of no contest, was sentenced to five months in jail, and surrendered his credential. As such, both girls sued the school district. An appellate court found that even though the district engaged in unconscionable affirmative acts that deterred one of the students from filing a claim, assigning 100% of the blame to the district and none to the teacher was not supported by the evidence.[45] The court did affirm that a $1,500,000 award to one student for the teacher's negligence and conspiracy suit was not excessive.

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[43] Plumeau v. School Dist. #40 County of Yamhill, 130 F.3d 432 [122 Educ. L. Rep. 588] (9th Cir. 1997).

[44] Oona R.-S.- By Kate S. v. McCaffrey, 143 F.3d 473 [126 Educ. L. Rep. 589] (9th Cir. 1998).

[45] Ortega v. Pajaro Valley Unified Sch. Dist., 75 Cal.Rptr.2d 777 [125 Educ. L. Rep. 1300] (App. 1998).

In the first of two cases from Georgia, students challenged the dismissal of their section 1983 action against school officials they charged with violating title IX after a security guard assaulted and raped one of the students. On further review, the Eleventh Circuit affirmed that the district was not liable for sexual harassment under title IX absent evidence that members of the board or superintendent had knowledge of the misconduct and failed to act.[46] The court added that the security guard's action in taking female students to an abandoned house for illicit sex was not a custom supporting section1983 liability against the district. Also, such liability could not be premised on the board's alleged failure to train or supervise employees.

One of three students who was sexually molested by a physical education teacher sued the district, principal, and teacher for violating title IX, section 1983, and various state laws including negligence, assault, battery, infliction of emotional distress, false imprisonment, and negligent hiring and supervision. Yet, there were no witnesses to the sexual activity and the student, who was aware of what was going to happen on each occasion, never told her mother or anyone at the school about what was happening between her and the teacher. A federal trial court in Georgia maintained that neither the district nor principal was liable under title IX for the teacher's behavior.[47] In addition, the court remarked that the district was protected from state law claims by sovereign immunity and that since the principal's actions were discretionary, he was entitled to official immunity.

High school students in South Carolina unsuccessfully filed a title IX discrimination claim against their district. The federal trial court granted the board's motion to dismiss, indicating that the board would have been liable for the alleged teacher-student sexual harassment only if a school official who had actual knowledge of it had the duty to supervise the harasser and the power to act to end it but failed to do so.[48] The court also commented that the board was not liable since it had no knowledge of alleged highly secret sessions between the students and teacher until the sexual relationships were terminated.

In Ohio, a student and her mother sued a school district and officials for violating section 1983 and state law arising out of incidents of sexual contact between her and a teacher. Following an investigation, the teacher was relieved of his duties and resigned. When the student stopped attending school based on her claim that she was ridiculed by peers and teachers, the district provided her with private tutoring. A federal trial court granted the board's motion for summary judgment in deciding that the teacher's having been previously reprimanded for similar behavior was insufficient to impose individual liability under section 1983.[49] In addition, the court decreed that neither the district nor school officials violated or failed to protect the student's civil rights. The court refused to apply the doctrine of pendent jurisdiction to address the student's state law claims while suggesting that she pursue them in that venue.

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[46] Floyd v. Waiters, 133 F. 3d 786 [123 Educ. L. Rep. 51] (11th Cir. 1998), *cert. granted* 119 S. Ct. 33 (1998).

[47] Davis v. DeKalb County Sch. Dist., 996 F. Supp. 1478 [126 Educ. L. Rep. 211] (N.D. Ga. 1998).

[48] Doe v. Berkeley County Sch. Dist., 989 F. Supp. 768 [124 Educ. L. Rep. 575] (D.S.C. 1997).

A former student challenged the denial of her claim that a female teacher sexually abused her twelve years earlier. After an appellate court reversed based on the student's inability to recognize or understand the emotional and sexual abuse, the teacher sought further review. On further review, the Supreme Court of Minnesota reversed in favor of the teacher.[50] The court declared that a reasonable person in the student's position would have known, or should have had reason to know, that the teacher's conduct constituted sexual abuse.

In Arizona, a former high school student sued a district and administrators under section 1983 and title IX concerning a sexual relationship that she had with an assistant principal. In response to the district's defense that the statute of limitations barred the former student from filing the suit, she provided evidence that the assistant principal's actions amounted to duress that tolled the statute. The student also claimed that the district knew of the assistant principal's actions toward her and other girls but failed to take appropriate action. The federal trial court agreed that since the student did not know of the district's failure until her lawyer began his investigation, the statute of limitations was tolled.[51] The court denied the district's motion for summary judgment since there were material facts in need of resolution.

Former high school students sought further review of their unsuccessful suit against their former track coach and district in which they alleged he sexually molested them when they were minors. An appellate court affirmed that the statute of limitations was not tolled when the former students were allegedly psychologically unable to understand the causal connection between their emotional problems and the coach's abuse.[52] On further review, the Supreme Court of Arizona vacated and remanded for further considerations.[53] The court reasoned that since the trial judge erred in applying the law, the case had to be remanded to determine whether the coach induced the students to delay filing the case and whether this delay was reasonable.

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[49] Burnell v. Williams, 997 F. Supp. 886 [126 Educ. L. Rep. 227] (N.D. Ohio 1998).

[50] W.J.L. v. Bugge, 573 N.W.2d 677 [123 Educ. L. Rep. 1282] (Minn. 1998).

[51] Jane Doe One v. Garcia, 5 F. Supp.2d 767 [127 Educ. L. Rep. 838] (D. Ariz. 1998

[52] Nolde v. Frankie, 949 P.2d 511 [122 Educ. L. Rep.1287] (Ariz. Ct. App.1997).

[53] Nolde v. Frankie, 964 P.2d 477 [129 Educ. L. Rep. 837] (Ariz. 1998).

Where parents sued the eighth grade teacher who allegedly sexually abused their daughter, the state revoked his teaching license. On appeal, the Supreme Court of Oregon affirmed a grant of summary judgment in favor of the district and reinstated the same on behalf of the teacher.[54] The court noted that since the parents submitted materials after the appropriate deadline, there was no basis for their section 1983 claim.

A former student sought further review of the denial of her suit against a school district for negligence and civil rights violations under section 1983 and her teacher for assault, battery and sexual abuse. The Supreme Court of Idaho affirmed that since the time limit for a minor to file notice of sexual abuse claim was governed by the state's Tort Claims Act, her failure to act within that time meant that her suit was correctly dismissed as untimely.[55]

Sexual Abuse by Other Parties

Parents of a fifteen-year-old student who was sexually assaulted by an intruder in a school locker room sued the district alleging that it failed to provide adequate supervision, protection and security, and to enact or enforce appropriate security policies. After trial and intermediate appellate courts rejected district's motion for summary judgment on the ground that it was entitled to statutory and official immunity, the district sought further review. The Supreme Court of Minnesota contended that since the district's failure or refusal to enact a security policy was operational level conduct and not protected by statutory immunity, the case had to be remanded to consider whether a common-law duty for protection of school children exists and if so, whether it applied to the school secretary, teacher, and custodian who observed the intruder loitering inside the building prior to the incident.[56]

Privacy

A high school student and her father petitioned for writ of mandamus to compel officials of the State Department of Education and a state university to release portions of the state twelfth grade proficiency test and vocational competency assessment pursuant to state Public Records Act (PRA). The Supreme Court of Ohio granted a limited writ in acknowledging that the proficiency examinations were a public record within the scope of PRA's disclosure requirements.[57] However, the court offered that the competency analysis profile component of the state vocational competency assessment was statutorily protected from disclosure. At the same time, the court mandated that while federal copyright laws did not prohibit release of competency analysis profile components, the competency analysis profile components could not be considered as intellectual property records. The court believed that the previous proficiency examinations and competency analysis profile components of vocational competency assessments were subject to unconditional disclosure.

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[54] Finney v. Bransom, 953 P.2d 377 [124 Educ. L. Rep. 1101] (Or. 1998).

[55] Osborn v. Salinas, 958 P.2d 1142 [127 Educ. L. Rep. 444] (Idaho 1998).

[56] S.W. v. Spring Lake Park Sch. Dist. 16, 580 N.W.2d 19 [127 Educ. L. Rep. 422] (Minn. 1998).

Where a teacher's aide initiated an incident with a high school student which resulted in his calling her a vulgar name, the student was suspended for a day and the aide was disciplined by having a letter placed in her file. When the student appealed his penalty to the board and requested an open hearing, the board granted the aide's request for a closed session based on her fear that her competence would be questioned and her reputation damaged. In response, the student's family filed suit alleging that the board violated the open meetings law. A trial court issued an order restraining the board from further violations and awarding attorney fees. On further review, the Supreme Court of Iowa affirmed that the law gave the student the right to an open session for a suspension hearing while affording an employee the right to a closed session for a performance evaluation.[58] According to the court, since this hearing was about a student suspension, not an employee evaluation, the board should have conducted an open session.

In the first of two cases from California, a newspaper publisher sought disclosure of a tort claim form submitted by a student. Under the state PRA, the school district complied with the request but requested review by an appellate court since the request could be repeated. The court denied the petition since the claim did not come within exemptions for public disclosure, did not violate any privacy interest, and did not comprise an educational or student record.[59]

A publisher in California challenged the denial of its motion to unseal the records over the settlement between a district and a student who was sexually assaulted by peers while at school. An appellate court was of the opinion that since the records were public documents and could not be sealed, the public had a legitimate interest in knowing how public funds are spent.[60]

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[57] State *ex rel.* Rea v. Ohio Dept. of Educ., 692 N.E.2d 596 [124 Educ. L. Rep. 1048] (Ohio 1998).

[58] Schumacher v. Lisbon Sch. Bd., 582 N.W.2d 183 [128 Ed.Law Rep. 341] (Iowa 1998).

[59] Poway Unified Sch. Dist. v. Superior Court, 73 Cal.Rptr.2d 777 [125 Educ. L. Rep. 165] (App. 1998).

[60] Copley Press, Inc. v. Superior Court, 74 Cal.Rptr.2d 69 [125 Educ. L. Rep. 173] (Ct. App. 1998).

Search and Seizure

A student in Virginia sued a principal, superintendent, and school board under section 1983 claiming they violated his Fourth Amendment rights when he was suspended after refusing to allow his backpack to be searched during an investigation. A federal trial court denied the student's claims for money damages but granted injunctive relief. On further review, the Fourth Circuit reversed in ascertaining that the search of the backpack for a pair of shoes was reasonable.[61]

In Illinois, a high school student appealed the dismissal of his claim an administrator violated the Fourth Amendment by searching him because he appeared to be acting under the influence of drugs during an after-school program. The Seventh Circuit affirmed that the administrator's search and order for a medical assessment of the student were reasonable and that neither the school's policy nor its alleged de facto policy requiring written reports about such searches were unconstitutional.[62]

Parents of high school students in Indiana sought further review of the denial of their suit challenging the constitutionality of a district's random drug testing program that was a pre-condition for participation in extracurricular activities.[63] The Seventh Circuit affirmed that the program passed muster under the Fourth and Fourteenth Amendments.[64] The court was satisfied that the testing policy was acceptable because it was designed to deter drug use rather than to catch and punish users. The court observed that the linchpin of this drug testing program was to protect the health of the students involved and that administrators had to have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.

Where sixth graders in Rhode Island claimed that school officials violated their Fourth and Fourteenth Amendment rights by conducting a pat down search to look for a missing knife from a cafeteria, the federal trial court granted the educators' motion for summary judgment.[65] The court stated that the search, which consisted of patting the front waistband area, the back pockets, and around the ankles of students was reasonable because it was minimally intrusive and the government had a compelling and urgent interest.

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[61] DEsRoches By DEsRoches v. Caprio, 156 F.3d 571 [129 Educ. L. Rep. 628] (4th Cir. 1998).

[62] Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146 [122 Educ. L. Rep. 94] (7th Cir. 1997).

[63] Todd v. Rush County Schs., 983 F. Supp. 799 [123 Educ. L. Rep. 120] (S.D. Ind. 1997).

[64] Todd v. Rush County Schs. 133 F.3d 984 [125 Educ. L. Rep. 18] (7th Cir. 1998), *cert. denied* 119 S. Ct. 68 (1998).

[65] Brousseau v. Town of Westerly, 11 F. Supp.2d 177 [128 Educ. L. Rep. 1069] (D.R.I. 1998).

A student who was suspended from his school's marching band for refusing to take part in a suspicionless drug test program required of all student participants in extracurricular activities unsuccessfully sought to enjoin the policy on the basis that it violated the Fourth Amendment. On further review, the Supreme Court of Colorado struck the policy down on the ground that since members of the marching band had a higher expectation of privacy than athletes, the policy was impermissible.[66] In addition, the court posited that urinalysis was not a good approach to the problem of illicit drug use in schools.

In a case involving sniff dogs, students were forewarned of the possibility that their lockers would be searched and that if a dog alerted officials to a locker, school officials would open and search both it and the adjacent locker. As a result of one such search during which school officials discovered a small amount of marijuana, a pipe, a roach clip and rolling papers, the student, who was suspended for ten days, filed for a motion to suppress the items seized from his locker in connection with the criminal charges. After trial an intermediate appellate court granted the motion to suppress, the state sought further review. The Supreme Court of Pennsylvania reversed and remanded for trial on the ground that the search did not violate the Fourth Amendment.[67] The court reflected that general searches of students' lockers do not violate the state constitutional search and seizure provision as long as they are carried out using neutral, clearly articulated guidelines.

Where the random search of a juvenile during the school day led to the discovery that he possessed a knife, he unsuccessfully sought to suppress the evidence. On further review, an appellate court in California affirmed that the random, metal detector search for weapons did not violate the Fourth Amendment.[68] The court concluded that the search was constitutional due to the substantial need of schools to keep weapons off campuses and to provide the students with campuses that are safe, secure, and peaceful.

In New Mexico, two students were strip searched after another student reported that a ring was missing from her desk. The school officials were found liable for punitive damages and appealed. An appellate court affirmed in part, reversed in part, and remanded in finding that the superintendent could be liable in his supervisory capacity for unconstitutional strip searches.[69] The court was of the view that the female student could not recover punitive damages from the prinicpal's secretary, who under the principal's direction, conducted the search but that the female student could recover damages from the principal. The court also pointed out that there was sufficient evidence to support an award of punitive damages to the male student who was strip searched by the principal.

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[66] Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 [129 Educ. L. Rep. 812] (Colo. 1998).

[67] Commonwealth v. Cass, 709 A.2d 350 [125 Educ. L. Rep. 705] (Pa. 1998).

[68] *In Re* Latasha W., 70 Cal.Rptr.2d 886 [123 Educ. L. Rep. 277] (Ct. App. 1998).

[69] Kennedy v. Dexter Consol. Schs., 955 P.2d 693 [125 Educ. L. Rep. 947] (N.M. Ct. App. 1998).

School personnel conducted a pat down search of the outer clothing of intermediate school students in an attempt to prevent a recurrence of egg-throwing melees. During the pat down, a gun was discovered. An order to suppress the evidence of the gun was granted and the school officials appealed. An appellate court in New York reversed in favor of the school officials.[70] The court ruled that a safety officer who was informed by a guidance counselor that a gun butt had been seen in a juvenile's waistband did not violate the Fourth Amendment since the officer acted based on sufficient individualized suspicion.

In Ohio, the warrantless search of the locker of a student who violated school rules by smoking cigarettes on campus led to the discovery that he had contraband. Subsequently, the student sought further review both of his suspension from school and the filing of a complaint which alleged that he was delinquent because he possessed drug paraphernalia. An appellate court affirmed that since the search of the student's locker was reasonable under the totality of the circumstances, it neither violated the Fourth Amendment nor the state constitution.[71] Yet, the court maintained that the current state statute allowing searches of lockers at any time as long as students have been warned of potential searches by a posted sign violates the Fourth Amendment.

Where a high school student was sent out of class for being disruptive, she stopped by the assistant principal's office, which was unattended, before she went to a time out room for the remainder of the day. Subsequently, the assistant principal's wallet was discovered in the girls' locker room. The credit cards and cash were missing. School officials searched the student's locker and recovered the stolen credit cards. After being convicted of credit card abuse, the student sought further review. An appellate court in Texas affirmed that the search was reasonable under federal and state constitutions and that the assistant principal who conducted the search acted under the color of school law rather than as a plain citizen even though she owned the stolen credit cards.[72]

In Florida, a student challenged the denial of his motion to suppress evidence that he had marijuana in his wallet. A school administrator uncovered the evidence after he entered a restroom based on information from students that boys were in it smoking marijuana. An appellate affirmed an adjudication of delinquency against the student in agreeing that the search was reasonable.[73]

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[70] Matter of Haseen N., 674 N.Y.S.2d 700 [127 Educ. L. Rep. 958] (App. Div. 1998).
[71] *In Re* Adam, 697 N.E.2d 1100 [127 Educ. L. Rep. 1029] (Ohio Ct. App. 1997).
[72] Shoemaker v. State, 971 S.W.2d 178 [127 Educ. L. Rep. 1117] (Tex. Ct. App.1998).

Instructional Issues

When several high school seniors were notified that they lacked the required course credits to graduate and that they could not participate in the commencement ceremonies, four of them obtained a temporary restraining order that allowed them to participate. On further review, the Supreme Court of Georgia held that the appeal was not moot even though the students had already participated in the ceremony.[74] In reversing, the court determined that the students did not have a property right to participate in the graduation ceremony.

In California, a federal trial court refused to issue a temporary injunction to students who challenged a voter-approved statute that replaced bilingual education with sheltered or structured English immersion education.[75] The court indicated that the students could not rely on the Supremacy Clause insofar as there was no evidence that the law was an inappropriate action to overcome language barriers required by the Equal Opportunity Act because the law was reasonably calculated to overcome language barriers. Moreover, the court declared that the statute did not violate title VI or equal protection since it does not inevitably cause an adverse effect, denial of benefits, or discrimination.

Parents of grade school children questioned a promotion policy that requires students to demonstrate subject matter proficiency for their grade level by receiving a satisfactory score on one of two standardized assessment tests. The parents, arguing that the policy violated the equal rights and due course of law provisions of the state constitution and that the policy was adopted in violation of the Open Meetings Act, sought a temporary restraining order directing the board to enact a new policy. The board filed a motion to dismiss for want of jurisdiction because the parents failed to exhaust administrative remedies. After a trial court granted the board's motion to dismiss in part for failure to exhaust remedies, the parents sought further review. An appellate court reversed on the basis that the parents were not required to exhaust administrative remedies.[76]

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[73] K.K. v. State, 717 So. 2d 629 [129 Educ. L. Rep. 884] (Fla. Dist. Ct. App. 1998).

[74] Dolinger v. Driver, 498 S.E.2d 252 [125 Educ. L. Rep. 986] (Ga. 1998).

[75] Valeria G. v. Wilson, 12 F. Supp.2d 1007 [129 Educ. L. Rep. 220] (N.D. Cal. 1998).

[76] Gibson v. Waco Indep. Sch. Dist., 971 S.W.2d 199 [127 Educ. L. Rep. 1131] (Tex. Ct. App. 1998).

Miscellaneous

When a board of education adopted a policy providing for voluntary condom distribution in its high schools, a parent group challenged it as violating state and federal law. The board had the suit removed to a federal trial court which granted its motion for summary judgment.[77] The court believed that the condom distribution program was authorized by state law as either a health service or educational program, that the federal statutory and constitutional privacy rights of minors prohibited requiring parental permission, and that because parents could easily opt out of the program preserved their liberty interests in directing the education and upbringing of their children, the board did not violate their rights. On appeal, the Third Circuit affirmed that the board acted within its statutory authority in implementing a consensual program to distribute condoms in public schools in order to prevent disease.[78] The court added that the board did not violate the constitutional rights of either students or parents since neither coerced participation nor offended the rights of parents to direct the care and custody of their children.

A junior high student committed suicide at home after twice trying to do so at school. The student's mother sued the board and officials under section 1983, alleging that their failure to train employees in suicide intervention and prevention techniques constituted deliberate indifference to her son's rights. The mother also filed a wrongful death claim based on the defendants' alleged breach of duty to supervise her son. After a federal trial court in Florida granted the board's motion for judgment as matter of law on the section 1983 claim, a jury returned a verdict on the state claim in deciding that the board and mother shared in the fault. On appeal, the Eleventh Circuit affirmed in part and certified a question to the Supreme Court of Florida.[79] The court noted that while the board did not have an affirmative constitutional duty to protect the student from harming himself, the administrators had an obligation under state law to inform his mother of his suicide attempts at school.

On remand in a suit wherein a male student questioned the constitutionality of a school board's hair length policy, trial and appellate courts wrote that it violated the Equal Rights Amendment and an anti-discrimination statute. The Supreme Court of Texas reversed in decreeing that the statute prohibiting discrimination by an officer or employee of a state or political subdivision on the basis of sex was not intended to prohibit schools from adopting and enforcing grooming or dress standards that differentiate between males and females.[80]

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[77] Parents for Better Schs. v. School Dist. Philadelphia, 978 F. Supp. 197 [122 Educ. L. Rep. 155] (E.D Pa. 1997).

[78] Parents United v. School Dist. of Philadelphia, 148 F.3d 260 [127 Educ. L. Rep. 670] (3rd Cir. 1998).

[79] Wyke v. Polk County Sch. Bd.,129 F.3d 560 [122 Educ. L. Rep. 118] (11th Cir. 1997).

Where a student-athlete sued his coach and district alleging violations of section 1983 as well as conspiracy to intentionally inflict emotional distress, a trial court granted the board's, but not the coach's, motion for summary judgment. On further review, the Supreme Court of Texas offered that the settlement or dismissal of action against a governmental unit raises questions about the immunity of its employees.[81] As such, the court noted that since the coach was immune due to the unchallenged summary judgment for the district, he was not required to post bond.

Parents of a public high school student sued their district, coaches, trainer, and others under section 1983 and state law following his death due to heat exhaustion during football practice. A federal trial court in Texas partially granted defendants' motion to dismiss.[82] The court was clear that due process protects a public school student from being "run to death" by his coaches and that liability was not precluded on the ground that he voluntarily participated in football practice. The court further mandated that the coaches and trainer were not entitled to qualified immunity and that the parents claims were sufficient to defeat the coaches' assertions of statutory immunity from the negligence claim.

Female members of a high school wrestling team sued their district alleging that it violated equal protection and discriminated based on sex when they were denied the opportunity to participate in mixed gender matches. A federal trial court in Texas granted the defendants' motion for summary judgment on all claims except for compensatory damages under section 1983.[83] The court denied the one motion in contending that it was precluded due to the existence of material facts as to whether the district adopted a discriminatory policy and whether the interschool wrestling association acted under the color of state law.

A teacher in Texas struck the right side of a student's chest with his index finger and knuckles following a rude remark that the pupil made to another teacher. The student, who was born without a right pectoral muscle, was injured by the blow and he sued for injuries that he sustained due to the allegedly excessive discipline. After a trial court granted the board's motion for summary judgment, the student sought further review. In dismissing the claim against the school district without prejudice, an appellate panel maintained that the trial court lacked jurisdiction to summary judgment against the board as the student had not exhausted administrative remedies.[84]

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[80] Board of Trustees of Bastrop v. Toungate, 958 S.W. 2d 365 [123 Educ. L. Rep. 392] (Tex. 1997).

[81] Newman v. Obersteller, 960 S.W.2d 621 [124 Educ. L. Rep. 466] (Tex. 1997).

[82] Roventini v. Pasadena Indep. Sch. Dist., 981 F. Supp. 1013 [122 Educ. L. Rep. 998] (S.D. Tex. 1997).

[83] Barnett v. Texas Wrestling Ass'n, 16 F. Supp.2d 690 [129 Educ. L. Rep. 1041] (N.D. Tex. 1998).

In Alabama, a biracial junior high school student sued the board and school officials alleging racial discrimination based on the way it nominated and elected homecoming queens. A federal trial court granted the defendants' motion for summary judgment on the ground that school officials acted within their discretionary authority in devising and implementing the challenged system.[85] However, the court denied another such motion under section 1983 as there was a question of material fact under state law as to whether school officials were final policy makers when dealing with homecoming. The court also denied a third motion for summary judgment since there was an unanswered question of material fact as to whether the system was long-standing and widespread enough to constitute an official policy.

The mother of a student who was killed in a fight at school sought further review of the dismissal of her action. An appellate court in Massachusetts affirmed that school officials had no constitutional obligation to protect the dead boy because he was murdered by private persons who were not acting under the color of the law and that his mother failed to state a section 1983 claim.[86] However, the court reversed in ascertaining that the town officials were not entitled to immunity.

Parents of a thirteen-year-old student sued their school district and his teacher based on statements that the educator allegedly made to the child. After a trial court rejected the defendants' motion to dismiss for failure to state a cause of action, an appellate panel in New York reversed and dismissed on their behalf.[87] The court explained that the teacher's remark, referring to the student as a Nazi, although inappropriate and irresponsible, did not support emotional distress claims and that it was not slanderous per se.

In the face of objections by parents who were displeased by the explicitness of AIDS prevention training that students received, a school board in New York passed a resolution that the presentations would occur only after school and that middle school students had to obtain parental permission to participate. When one parent was still dissatisfied, the Commissioner of Education rejected her grievance on the basis that parental consent gave parents the opportunity to opt out of the program. Subsequently, an appellate court agreed that the mother was not entitled to a formal hearing or a trial.[88]

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[84] Grimes v. Stringer, 957 S.W.2d 865 [123 Educ. L. Rep. 380] (Tex. Ct. App. 1997).

[85] Godby v. Montgomery County Bd. of Educ., 996 F. Supp. 1390 [126 Educ. L. Rep. 182] (M.D. Ala. 1998).

[86] Brum v. Town of Dartmouth, 690 N.E.2d 844 [123 Educ. L. Rep. 1260] (Mass. App. Ct. 1998).

[87] Harville v. Lowville Cent. Sch. Dist., 667 N.Y.S.2d 175 [123 Educ. L. Rep. 844] (App. Div. 1997).

When parents in New York unsuccessfully sued because their school district failed to perform an annual scoliosis test on their daughter, an appellate court affirmed that they did not have a private cause of action for noncompliance.[89] The court pointed out that since three years had passed between tests and that the child's scoliosis had progressed to the point that it required surgery, the district was immune from liability.

The estate of a student who was shot to death at school challenged a grant of summary judgment in favor of the district. An appellate panel in South Carolina reversed and remanded in acknowledging that there was sufficient evidence to create a jury question as to whether the school district acted in a grossly negligent manner.[90]

In Arizona, a mother sought further review of the dismissal of her suit against the district and a teacher for negligence and wrongful death after her son was shot to death by another student off school property. An appellate court affirmed that the district did not fail to meet its statutory duty or create unreasonable risk to the deceased student by failing to discipline the pupil who killed him after the two were involved in a verbal altercation at school.[91] Further, the court was of the opinion that since the shooting was not foreseeable, it did not impose a duty on the district to discipline pupils for disorderly conduct on the way to and from school even though a teacher saw a gathering of students after class apparently anticipating a fight.

Where a female school student was cut in the face by another student during a fight on a school bus, she unsuccessfully sued the district, assistant principal, and bus driver. The student claimed that even though the administrator and driver knew that the assailant regularly carried a knife and threatened her with it, they failed to protect her by enforcing the rules prohibiting students from carrying weapons on school property. An appellate court in Georgia affirmed that the district was not liable due to sovereign immunity while the administrator and driver were protected by official immunity.[92]

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[88] Akshar v. Mills, 671 N.Y.S.2d 856 [125 Educ. L. Rep. 802] (App. Div. 1998).

[89] Uhr v. East Greenbush Cent. Sch. Dist., 675 N.Y.S.2d 704 [128 Ed. Law Rep. 807] (App. Div. 1998).

[90] Etheredge v. Richland Sch. Dist. I, 499 S.E. 2d 238 [126 Educ. L. Rep. 490] (S.C. Ct. App. 1998).

[91] Hill v. Safford Unified Sch. Dist., 952 P.2d 754 [124 Educ. L. Rep. 721] (Ariz. Ct. App. 1997).

[92] Payne v. Twiggs County Sch. Dist., 501 S.E.2d 550 [127 Educ. L. Rep. 448] (Ga. Ct. App. 1998).

Sanctions for Student Misconduct

Generally

A high school freshman who was disciplined for disruptive behavior in a science class sued the school committee, city, and teacher alleging violations of due process when he was referred to the police for threatening a teacher. The police investigated but did not find sufficient evidence to prosecute. Upon being removed for the remaining five weeks of the term from the class of the teacher with whom he had the altercation, the student received individual instruction but still failed the course. The federal trial court in Rhode Island judged that insofar as there was no evidence of custom or practice supporting municipal liability, neither the school committee nor city were proper defendants.[93] The court added that the student was not deprived of a public education or due process.

In Maryland, a student sought further review of an adjudication that he was delinquent for possessing a deadly weapon on school property. An appellate court reversed on the ground that in order to convict a person of carrying or possessing any rifle, gun, or knife on school property, the state must show that the instrument can, under the circumstances, reasonably be considered a deadly weapon.[94] The court was of the view that the butter knife that was uncovered in the student's school locker was incapable of being used as a deadly weapon.

Where a ten-year-old in Idaho was charged with lewd and lascivious conduct, a magistrate suppressed the student's confession on the ground that it was involuntary. On further review, an appellate court reversed and reinstated the confession.[95] The court was satisfied that since the child who was questioned at the elementary school by a police officer would have considered himself in custody for Miranda purposes, the confession could be used.

A student challenged his conviction for assault after he threw a half eaten apple at a teacher, which knocked him to the floor and rendered him unconscious. An appellate court in California reversed in favor of the student.[96] The court observed that since assault requires an intentional act that is dangerous to human life or is based on criminal intent and the student merely intended to splatter the apple against a wall rather than strike the teacher, no assault occurred.

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[93] Casey v. Newport Sch. Comm., 13 F. Supp.2d 242 [129 Educ. L. Rep. 261] (D.R.I. 1998).

[94] *In Re* Melanie H., 706 A.2d 621 [124 Educ. L. Rep. 608] (Md. Ct. Spec. App. 1998).

[95] State v. Doe, 948 P.2d 166 [122 Educ. L. Rep. 820] (Idaho Ct. App. 1997).

[96] *In Re* Gavin T., 77 Cal.Rptr.2d 701 [128 Educ. L. Rep. 313] (Ct. App. 1998).

In Georgia, a high school student who had three razor blades in her backpack sought further review of her adjudication as delinquent and placement on probation for a drug related offense At issue on appeal was not whether a single-edged razor blade could be used as a weapon but whether it can be defined as a weapon within the meaning of the School Safety Zone Act. An appellate court reversed in finding that a single-edged razor blade is not a weapon within the meaning of the Act.[97]

A student who sued a teacher and principal for violating the state's corporal punishment by allegedly choking and restraining him for misbehaving in class sought further review of a grant of summary judgment in favor of the educators. The teacher claimed that after the student, who was a perennial problem in class, ignored repeated warnings for disrupting her class, she grasped his face and turned it toward her to get his attention rather than to punish him. An appellate court in Georgia affirmed that since the teacher's action was not corporal punishment, both she and the principal were entitled to official immunity.[98]

Suspension and Expulsion

Where a student in Illinois challenged his three-day suspension for inappropriate behavior, a federal trial court entered a motion for summary judgment. On further review, the Seventh Circuit affirmed that the trial court did not abuse its discretion in refusing to allow the parent to file a late response to the board's motion for summary judgment.[99] The court held that no genuine issues of material fact existed and that the suspension did not violate either due process or equal protection.

In Wisconsin, a school board challenged a preliminary injunction that prevented it from expelling a student who published an article in an underground newspaper about how to hack into the system's computers. In vacating, the Seventh Circuit agreed that the student was not entitled to a preliminary injunction in view of harm to the board.[100] The court was convinced that an injunction would have caused the board significant harm as it would have undermined its authority to impose discipline for threats of harm to school property.

A high school student and his parents unsuccessfully sued a school board alleging that it violated his due process rights when he was suspended and expelled for bringing a pocketknife to school. The Supreme

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[97] *In Interest of* R.F.T., 492 S.E.2d 590 [122 Educ. L. Rep. 330] (Ga. Ct. App. 1997).

[98] Daniels v. Gordon, 503 S.E.2d 72 [128 Educ. L. Rep. 909] (Ga. Ct. App. 1998).

[99] Smith on Behalf of Smith v. Severn, 129 F.3d 419 [122 Educ. L. Rep. 106] (7th Cir. 1997).

[100] Boucher v. School Bd. of Greenfield,134 F.3d 821 [123 Educ. L. Rep. 500] (7th Cir. 1998).

Court of Virginia affirmed that the board did not violate the student's rights.[101] In addition, the court stated that the pocketknife was not a firearm within the meaning of a state law requiring boards to expel students for one year for bringing a firearm to school.

Where judicial review annulled an order from the Commissioner of Education to expunge all references to a high school student's suspension for endangering the welfare of others based on the content of his underground publication, he sought further review. The Court of Appeals of New York affirmed the appropriateness of the student's suspension since the notice that he received satisfied the requirements of due process despite its failure to specify that his misconduct occurred on school grounds.[102] In addition, the court remarked that there was unimpeached testimony that the student admitted to the charged misconduct but since the Commissioner's determination was based on an erroneous assumption concerning the record, it lacked a rational basis.

After a student was suspended for ten days for stealing a disc player from a locker, he was excluded for another ten days when he was caught in school with marijuana and regular cigarettes. Following a recommendation from administrators that the student be expelled for repeated offenses, the superintendent sent his parents notice of the hearing. On further review of an order reinstating the student, the Supreme Court of Pennsylvania reversed in favor of the district.[103] The court ruled that there were no irreconcilable differences between the district's discipline code and that of the middle school since there was no guidance in the former for the types of offenses for which expulsion was proper. Further, the court agreed with the district that the student and his parents received proper notice of the charges that led to his expulsion.

A school board challenged an injunction that prohibited it from expelling a student who violated school rules by possessing marijuana off school grounds after school hours. The Supreme Court of Connecticut affirmed the order that enjoined the board from expelling the student from school and extracurricular activities.[104] The court further maintained that the state law that allows expulsion for misconduct occurring off of school property was unconstitutionally vague as applied to this case because it did not provide adequate notice; at the same time, the court held that the law was not unconstitutionally vague on its face.

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[101] Wood v. Henry County Pub. Schs., 495 S.E.2d 255 [123 Educ. L. Rep. 373] (Va. 1998).

[102] Board of Educ. v. Commissioner of Educ., 667 N.Y.S.2d 671 [123 Educ. L. Rep. 876] (1997).

[103] Hamilton v. Unionville-Chadds Ford Sch., 714 A.2d 1012 [128 Educ. L. Rep. 796] (Pa. 1998).

[104] Packer v. Board of Educ. of Thomaston, 717 A.2d 117 [129 Educ. L. Rep. 400]. (Conn. 1998).

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In Minnesota, a student and his parents brought a section 1983 action against a school district and its superintendent when he was expelled for five days along with four classmates for bringing a BB gun on to school property.[105] Almost two years after the State Department of Education overturned the student's expulsion, he and his parents filed suit alleging that his procedural and substantive due process rights were violated by suspending and expelling him without a fair hearing and without substantial evidence to support the conclusion that he had violated a school policy. The federal trial court in Minnesota granted the district's motion for summary judgment and dismissed the action with prejudice on the basis that issue and claim preclusion applied to the student's allegations.

A high school student who was suspended for five days for possession of alcohol on school property filed a section 1983 action against the school, its principal, the superintendent, and board. The suit alleged that the manner in which the student was informed of the suspension violated his procedural due process rights and that the discipline policy regarding alcohol possession by students was unconstitutionally applied. A federal trial court in Kentucky granted the defendants' motion for summary judgment, asserting that the suspension, as a matter of law, did not violate the student's constitutional rights.[106] The court noted that the high school's disciplinary policy was applied constitutionally, that the principal complied with due process in carrying out the suspension, and that the suspension was not arbitrary.

Where a juvenile was convicted of second-degree criminal assault and suspended for five days for punching another student in the face, he challenged the penalties as double jeopardy. An appellate court in Washington affirmed that since the suspension had the remedial purpose of using disciplinary measures to maintain a healthy learning environment for all students, it was not punishment for the purposes of double jeopardy and did not bar his criminal prosecution for assault.[107]

A high school student in Missouri and his mother obtained a temporary restraining order preventing a school district from either expelling him or preventing him from participating in a track meet due to nonresidency. When a trial court dismissed the petitions after school officials withdrew an expulsion order, the plaintiffs sought further review. An appellate court dismissed on the basis that since the expulsion was voided and the student did not miss any school, the injunction was moot.[108]

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[105] Peterson v. Independent Sch. Dist. No. 811, 999 F. Supp. 665 [126 Educ. L. Rep. 796] (D. Minn. 1998).

[106] Pirschel v. Sorrell, 2 F. Supp.2d 930 [127 Educ. L. Rep. 124] (E.D. Ky. 1998).

[107] State v. Knutson, 946 P.2d 789 [122 Educ. L. Rep. 327] (Wash. Ct. App. 1997).

[108] Gray v. Humphries, 960 S.W.2d 553 [124 Educ. L. Rep. 462] (Mo. Ct. App. 1998).

In the first of two cases from North Carolina, a student who was adjudicated delinquent challenged his suspension for stealing cash and checks from his school. An appellate court affirmed that the juvenile's suspension under the circumstances was not punishment within the meaning of the double jeopardy clause.[109] The court also indicated that the juvenile's inculpatory statements to the assistant school principal were admissible without Miranda warnings.

A high school student questioned his ten-day suspension following an altercation on a bus. An appellate panel in North Carolina affirmed that a trial court lacked subject matter jurisdiction to review disciplinary actions of school boards which result in suspensions from school of ten days or less.[110] In addition, the court believed that the collateral consequences of the student's suspension did not covert it into one of more than ten days for the purpose of determining the availability of judicial review.

In Florida, a student sought further review of his expulsion for violating the school rule against possessing bullets on school property. At his expulsion hearing, the student's attorney argued that he had been charged with possession of a weapon and that bullets were not weapons. An appellate court reversed in favor of the student in positing that, as a matter of law, he did not violate the board's rule against using dangerous, distracting, defacing, or dangerous items at school.[111]

A school questioned an order enjoining the two-day suspension of a student who defaced the house of a teacher. An appellate court in Ohio reversed and remanded.[112] The court decided that since the suspension was not a final appealable order, the student had to exhaust administrative remedies before seeking injunctive relief.

In a second case from Ohio, a high school student sought further review of the dismissal of his five-day suspension for a second violation of his school's policy against smoking on school grounds. An appellate court reversed in favor of the student.[113] The panel offered that the appeal was not moot even though the student had graduated because the appeal presented a matter of public interest that was capable of repetition. The court declared that while the student received due process, the trial judge should have conducted a *de novo* hearing to review the board's action.

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[109] Matter of Phillips, 497 S.E. 2d 292 [124 Educ. L. Rep. 1120] (N.C. Ct. App. 1998).

[110] Stewart v. Johnston County Bd. of Educ., 498 S.E.2d 382 [125 Educ. L. Rep. 989] N.C. Ct. App. 1998).

[111] M.K. v. School Bd. of Brevard County, 708 So. 2d 340 [125 Educ. L. Rep. 253] (Fla. Dist. Ct. App. 1998).

[112] Webb v. Ironton City Schs., 686 N.E. 2d 285 [122 Educ. L. Rep. 273] (Ohio Ct. App. 1996).

[113] Dawson v. Richmond Heights Local Sch. Bd., 700 N.E.2d 359 [129 Educ. L. Rep. 454] (Ohio Ct. App. 1997).

Where middle school students enjoined their district from expelling them for possessing a BB gun at school, the system sought further review. An appellate court reversed and remanded in commenting that even though a BB gun was not defined as a dangerous weapon, the statute governing weapon free school zones did not preclude it from establishing a policy mandating permanent expulsion of a student for possession of a BB gun on school property.[114]

A board challenged an order reinstating a high school student that it expelled for three semesters for gross misconduct, harassment, and verbal intimidation of other pupils. Even though there was conflicting testimony over who had a gun and threatened to use it, the board expelled the student. An appellate court affirmed that the board's expansive use of accusatory hearsay was inconsistent with and violated the student's right to due process.[115]

Desegregation

Desegregation Plan Oversight

In yet another chapter of the long running litigation involving Kansas City's public schools, the Eighth Circuit vacated an earlier judgment and granted an *en banc* rehearing[116] on the limited issue of awarding fees to expert witnesses,[117] explaining that this did not disturb the remainder of its opinion. However, when the appellees withdrew their claim for expert witness fees, the court vacated its earlier order and dismissed the case as moot.[118]

When a federal trial court denied the state's motion for consideration of whether Kansas City achieved unitary status along with approving a transition plan and settlement that would have dismissed the state from the case, both parties appealed. The Eighth Circuit affirmed that the plaintiffs were entitled to attorney fees for approval of a settlement agreement between the state and school district for the time their counsel spent in seeking a stay pending appeal, but not for the time that the attorney spent in talking with the media.[119] The court also reasoned that the terms of the settlement did not shift liability to the school district for an award of statutory attorney fees incurred by the plaintiffs in opposing the approval of the agreement.

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[114] Davis v. Hillsdale Community Sch. Dist., 573 N.W.2d 77 [123 Educ. L. Rep. 900] (Mich. Ct. App. 1997).

[115] Colquitt v. Rich Township High Sch. No. 227, 699 N.E.2d 1109 [129 Educ. L. Rep. 733] (Ill. App. Ct. 1998).

[116] Jenkins v. State of Mo., 128 F.3d 1201 [122 Educ. L. Rep. 572] (8th Cir. 1997).

[117] Jenkins v. State of Mo., 133 F.3d 559 [123 Educ. L. Rep. 475] (8th Cir. 1997).

[118] Jenkins By Jenkins v. State of Mo., 133 F.3d 560 [123 Educ. L. Rep. 476] (8th Cir. 1997).

[119] Jenkins By Jenkins v. State of Mo.,131 F.3d 716 [122 Educ. L. Rep. 967] (8th Cir. 1997).

As part of a long running desegregation suit in St. Louis, a special school district disputed an order on quality-education goals for vocational education as a trial court designated it as the sole provider of such services for students in the city and county. Later, the court ordered the monitoring committee to develop quality-education goals, that the district did not question, by which its performance under the desegregation remedy would be measured. When the special district subsequently sought further review of an order creating the Career Education District (CED) to improve the administration of vocational education, the Eighth Circuit dismissed it as moot since an earlier order eliminated its obligations relating to the quality-education goals.[120] In a related action, the board in St. Louis appealed two orders establishing the 1997-1998 budget for its area vocational education program. The Eighth Circuit affirmed that since the board failed to show clear error and manifest injustice, the district court did not abuse its discretion.[121]

Where a federal trial court ordered the state to pay the special school district's cost of providing special education for voluntary, interdistrict transfer students, it sought further review. The Eighth Circuit decreed that the school system waived the right for reimbursement of costs in the years prior to its declaration.[122] The court acknowledged that the doctrine of laches barred the district from seeking reimbursement of these prior expenses and that diagnostic, screening, and evaluation costs were not reimbursable under the special education plan. At the same time, the Eighth Circuit dismissed the special district's challenge of an order that it accept city-to-county direct transfer special education students as moot. According to the court, the issue was moot since the students were accepted and enrolled in the district for the current school year and the order did not address future years.[123]

In an ongoing desegregation case in Illinois wherein a district sued the state alleging that its actions contributed to segregated schooling, the public interest group that was the plaintiff in the underlying suit unsuccessfully sought to intervene. The Seventh Circuit affirmed the dismissal of the plaintiff's motion to intervene as the special interest group lacked the interest necessary to support its involvement.[124] When the school board subsequently voted unanimously to fund a desegregation-related expenditure plan, it was deadlocked on an appeal of the order as three of its members challenged the court's directive to levy additional property tax to pay for the remedial plan. A federal trial court in Illinois ascertained that the members lacked a legally cognizable interest and that their request to intervene was untimely.[125]

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[120] Liddell v. Board of Educ. of City of St. Louis, 142 F.3d 1100 [126 Educ. L. Rep. 116] (8th Cir. 1998).

[121] Liddell v. Board of Educ. of City of St. Louis, 142 F.3d. 1106 [126 Educ. L. Rep. 122] (8th cir. 1998).

[122] Liddell v. Board of Educ. of City of St. Louis, 142 F.3d 1103 [126 Educ. L. Rep. 118] (8th Cir. 1998).

[123] Liddell v. Board of Educ. of City of St. Louis, 142 F.3d 1111 [126 Educ. L. Rep. 125] (8th Cir. 1998).

[124] Rockford Bd. of Educ. v. Illinois Bd. of Educ., 150 F.3d 686 [128 Educ. L. Rep. 92] (7th Cir. 1998).

When, after years of desegregation litigation, the parties including the state of Arkansas entered into a comprehensive settlement agreement, a school district sought further review of the denial of its motion for dismissal of the case with prejudice. The Eighth Circuit reversed in explaining that the school district was entitled to dismissal based on the terms of the earlier settlement agreement.[126]

The state of Arkansas appealed a grant of summary judgment in favor of school districts which claimed that its new teacher retirement and health insurance funding plans violated their desegregation agreements. The Eighth Circuit affirmed that the new funding system violated the agreements since it provided proportionally less money to three districts that had higher employee to student ratios.[127]

A board in Louisiana that operated a dual school system moved for a declaratory judgment in an attempt to invalidate a state constitutional amendment and statute that were designed to divide its school system into two districts. The board charged that the proposed changes would have interfered with its ability to conform to the desegregation order. When a federal trial court struck down the amendment, the state attorney general appealed. The Fifth Circuit vacated on the ground that the case was moot insofar as the board for the new proposed district had yet to be elected.[128]

Students of Chinese descent who were denied admission to the public schools of their choice because of ethnically-based enrollment limitations in a desegregation consent decree requested further review of the dismissal of their section 1983 action challenging the decree. After the students, joined by the California State Board of Education, obtained a writ of mandamus preventing the scheduled trial, the Ninth Circuit dismissed their appeal on the ground that the school district engaged in state action by subjecting students to race-based classification.[129] The court added that the existence of vestiges of discrimination which originally justified the imposition of racial classification and quota system remained for trial.

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[125] People Who Care v. Rockford Bd. of Educ., 179 F.R.D. 551 [128 Educ. L. Rep. 262] (N.D. Ill. 1998).

[126] Little Rock Sch. Dist. v. North Little Rock Sch. Dist.,131 F.3d 1255 [122 Educ. L. Rep. 989] (8th Cir. 1997).

[127] Little Rock Sch. Dist. v. North Little Rock Sch. Dist., 148 F.3d 956 [127 Educ. L. Rep. 740] (8th Cir. 1998).

[128] Valley v. Rapides Parish Sch. Bd., 145 F.3d 329 [126 Educ. L. Rep. 695] (5th Cir. 1998).

[129] Ho by Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 [127 Educ. L. Rep. 614] (9th Cir. 1998).

As part of a long running desegregation suit from New York, the United States and civil rights organizations sued a variety of public officials. A federal trial court was convinced that a strong preponderance of the evidence demonstrated that vestiges of segregation remained in the public school system and that the many steps that were taken to address the problems were inadequate. In contending that the state was liable for eliminating segregation, the court devised a formula designating state and local financial liability as an appropriate remedial remedy.[130]

In a related action, the court found that the city, board, and Urban Development Council (UDC), among others, were liable for racial segregation and that vestiges remained in the schools. However, when the court precluded state liability, the plaintiffs appealed. The Second Circuit stated the UDC was liable for not taking steps to desegregate the schools by providing non-discriminatory housing. On remand, the district court held that since the UDC's failure to take appropriate steps was a continuing wrong, it was not barred by the statute of limitations.[131] Subsequently, when the court found the city and state equally responsible for allowing vestiges of segregation to remain, it ordered them to make equal financial contributions toward remediation.[132] More specifically, the court directed the city to separate the costs of the plan from its general operating costs in preparing budgets.

A county board in Maryland sought to modify an order covering the racial admission guidelines for its magnet school because recruiting efforts failed to place as many non-African-American students as called for in its desegregation agreement. The court permitted the modification but deferred the issue of whether the board should have been more diligent in recruitment of non-African-American students for trial.[133]

In a case that received national attention, a high school student sued the Boston School Committee and school officials challenging the constitutionality of its admission policy with regard to three examination schools, most notably the Boston Latin School.[134] The policy admits half of each class solely on the basis of composite score ranking; the other half of the class is admitted in conjunction with flexible racial/ethnic guidelines. The student alleged that but for the application of the policy, which violated the Fifth and Fourteenth Amendments, she would have been admitted to the ninth grade at Boston Latin. Ruling in favor of the Committee, the federal trial court held that government had a compelling interest in achieving diversity within the unique context of public intermediate and secondary school education. Moreover, the court was satisfied that the policy was sufficiently narrowly tailored to achieve the important governmental purpose of admitting only highly qualified applicants in overcoming the past effects of discrimination while avoiding segregation.

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[130] United States v. Yonkers Bd. of Educ., 984 F. Supp. 687 [123 Educ. L. Rep. 544] (S.D.N.Y. 1997).

[131] United States v. Yonkers Bd. of Educ., 992 F. Supp. 672 [125 Educ. L. Rep. 95] (S.D.N.Y. 1998).

[132] United States v. Yonkers Bd. of Educ., 7 F. Supp.2d 396 [128 Educ. L. Rep. 137] (S.D.N.Y. 1998).

[133] Vaughns v. Board of Educ., of Prince George's County, 980 F. Supp. 834 [122 Educ. L. Rep. 709] (D. Md. 1997).

[134] Wessmann by Wessmann v. Boston Sch. Comm., 996 F. Supp. 120 [125 Educ. L. Rep. 1214] (D. Mass. 1998).

The State Board of Education, its superintendent of instruction, and the Cleveland Board of Education filed a motion for unitary status. A federal trial court in Ohio granted the motion in asserting that the defendants complied with remedial orders as well as an earlier consent decree by eliminating vestiges of past discrimination and segregation and by demonstrating a good faith commitment to their constitutional obligations.[135]

In North Carolina, a student brought a Fourteenth Amendment suit against her district alleging that it denied her the benefits of a magnet school program because of her race. The board moved for dismissal claiming that the magnet program was instituted in an attempt to comply with a federal trial court's continuing orders in another case which required it to account for race in student assignments. A federal trial court denied the district's motion for dismissal and granted the student's motion that the case be restored to the active docket.[136] A year later, the court continued to monitor the dispute as the student's father sued on the ground that since the denial was on account of his daughter's race, it violated equal protection. In consolidating the case with a prior desegregation action, the court was of the opinion that the father was entitled to permissive intervention because it was timely, concerned a common question of law or fact, and would not delay or prejudice the adjudication of the original parties.[137] Subsequently, when attorneys for the plaintiff moved to withdraw, the district sought their disqualification due to the merger of two of the firms that were involved in the litigation. The court wrote that although one of the attorneys in the merged firm was part of the practice that provided an informational briefing to the district in a desegregation case more than twenty years earlier, the matters were not sufficiently related to the case at bar.[138] The court was content that the attorney-client relationship would neither result in the revealing of confidential information matters nor compromise the integrity of the case.

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[135] Reed v. Rhodes, 1 F. Supp.2d 705 [126 Educ. L. Rep. 951] (N.D. Ohio 1998).

[136] Capacchione v. Charlotte-Mecklenburg Bd. of Educ. 179 F.R.D. 177 [126 Educ. L. Rep. 1049] (W.D.N.C. 1998).

[137] Capacchione v. Charlotte-Mecklenburg Board of Educ., 179 F.R.D. 502 [128 Educ. L. Rep. 258] (W.D.N.C. 1998).

Cross-District Remedies

In a case from Missouri, the Eighth Circuit affirmed that a special school district that was created to provide secondary vocational education for a city and county failed to achieve unitary status.[139] Even so, the court indicated that it would leave the question of provider of vocational education services to the state legislature. In addition, the court decided that the teachers who were employed by the special district would not have retained tenure rights if they were hired by the Career Education District.

State Court Cases

An appellate panel in California denied a school board's motion for a writ of mandamus to vacate an order that terminated supervision over a court-ordered desegregation plan. The court held that since the board failed to establish that school integration funding would be lost due to the modification, it did not demonstrate enough of a public injury to warrant issuing a writ to vacate the modified order.[140] The panel added that the trial court did not abuse its discretion in accelerating the termination of its supervisory jurisdiction over the school desegregation plan.

Conclusion

This chapter focused on constitutional and statutory concerns with regard to students in American schools as courts continue to address and refine issues that have been litigated for many years. Among the issues that were discussed in this chapter are students' First Amendment rights to freedom of religion and speech; the need for school officials to protect students by providing a safe, orderly school environment; and the dissolution of barriers to equal educational opportunity for all children. Yet, even in safeguarding the substantive rights of students, the courts are careful to support school districts when they take appropriate actions. The combination of social issues and the increasingly litigious nature of American society will likely ensure a steady flow of cases concerning the rights of students.

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[138] Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 9 F. Supp.2d 572 [128 Educ. L. Rep. 714] (W.D.N.C. 1998).

[139] Liddell v. Special Sch. Dist., 149 F.3d 862 [128 Educ. L. Rep. 39] (8th Cir. 1998).

[140] Board of Educ.v. Superior Court (Carlin), 71 Cal.Rptr.2d 562 [123 Educ. L. Rep. 786] (Ct. App. 1998).

4
BARGAINING

Julie F. Mead

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Introduction

This chapter focuses on employment disputes between schools and their employees that took place during the 1998 calendar year. The many, varied issues touch on both constitutional and statutory concerns illustrating the continuing role of administrative hearings and judicial review in the relationship between school district management and their bargaining partners.

Constitutional Issues

Five cases considered issues brought under the United States Constitution. The first three cases involved the First Amendment. The other two touched on the Fourteenth Amendment.

First Amendment

In a case from Arkansas, the Eighth Circuit allowed a teachers' union to proceed with a section 1983 suit that alleged the superintendent and other district employees engaged in verbal harassment and activities designed to prevent the union from exercising its right to freedom of association.[1] The court ruled that although the teachers failed to allege sufficient facts to sustain a suit against the district, their claim against the superintendent could proceed because a supervisor can be held individually liable under section1983 for improper behavior. The court added that supervisors may express their views as long as their opinions do not motivate official acts.

When bargaining between a religiously affiliated school and its lay teachers failed to produce a contract, management informed the union that it would no longer recognize it or engage in collective bargaining. After an administrative law judge and a trial court agreed with the union that management engaged in an unfair labor practice, school officials sought further review of an order compelling them to bargain. An appellate court affirmed that the State Employment Relations Board (SERB) did not violate the First Amendment by ordering bargaining over the secular terms of a contract as this did not implicate issues of religious freedoms because matters of religion or religious instruction are outside the scope of bargaining.[2]

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[1] Springdale Education Ass'n v. Springdale Sch. Dist., 133 F.3d 649 [123 Educ. L. Rep. 42] (8th Cir. 1998).

[2] New York State Employment Relations Bd. v. Christian Brothers Academy, 668 N.Y.S.2d 407 [124 Educ. L. Rep. 356] (App. Div. 1998).

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In a second case from New York, a teachers' union challenged an injunction that barred it from picketing outside of a school, claiming that the injunction violated its First Amendment right to freedom of speech. An appellate court affirmed that the injunction did not, in and of itself, provide sufficient evidence of a content restriction or speech that violated the First Amendment. The intent of the injunction was designed to shelter boys with emotional disturbances who were enrolled in the residential facility from the dispute between the school and the teachers.[3]

Fourteenth Amendment

The protection of liberty interests under the Fourteenth Amendment was raised in an appeal from Florida after a teacher was reassigned from band director to assistant band director. The teacher alleged that she was demoted after a letter from a parent, accusing her of misconduct, was made public at a school board hearing. An appellate court affirmed that there were two reasons why the teacher was not entitled to a name clearing hearing.[4] First, the court pointed out that nothing in the record indicated that the board relied on the letter when it offered the teacher a supplemental contract as assistant director rather than director. Second, the court noted that she continued to work in the district as both a teacher and assistant band director. The court concluded that the teacher's charge of deprivation of liberty interest were not substantial enough to sustain a Fourteenth Amendment claim.

District employees and their union challenged changes in Illinois law that affected the public schools in Chicago. The changes included shifting responsibility for deciding dismissal hearings from a hearing officer to the school board, allowing staff without certification to be fired without cause, and changing the list of issues that were subject to bargaining. Although a number of allegations were leveled, the only issues that a federal district court addressed dealt with claims under the Fourteenth Amendment's due process and equal protection clauses. As to the first, the court rebuffed the notion that due process was offended when the board, rather than a hearing officer, was given the authority to make employment decisions.[5] The court maintained that even if the property rights of employees were implicated by such a shift, the legislative process constituted adequate procedural due process under the Fourteenth Amendment. The equal protection allegation was likewise rejected. The court was satisfied that even though the plaintiffs alleged that the changes were motivated by racial and political animus, there was no need to subject the modifications to anything more than the rational basis test. Applying the test, the court was of the opinion that it was reasonable and rational for the legislature to attack school reform in Chicago differently than the rest of the state if for no other reason than because of the size of the district.

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[3] Children's Village v. Greenburgh Eleven Teachers' Union Fed'n of Teachers, Local 1532, 671 N.Y.S.2d 504 [125 Educ. L. Rep. 785](App. Div. 1998).

[4] Sickon v. School Bd. of Alachua County, 719 So. 2d 360 [130 Educ. L. Rep. 944] (Fla. Dist. Ct. App. 1998).

[5] Hearne v. Board of Educ. of City of Chicago, 996 F. Supp. 773 [126 Educ. L. Rep 156] (N.D. Ill. 1998).

Federal Statutory Issues

The first of two cases examining the relationship between federal statutes and collective bargaining agreements arose in New Hampshire over whether judicial affirmation of the decision of the State Board of Education finding cause for nonrenewal precluded a teacher from challenging her dismissal under the Americans with Disabilities Act. The case also examined whether such discrimination claims were subject to mandatory arbitration under a collective bargaining agreement. The First Circuit Court answered both questions in the negative.[6] Applying precedent set by the Supreme Court of New Hampshire, the Panel decided that state law did not prevent a teacher from filing a state claim that could subsequently be appealed in a state venue. State statutes could not prevent the teacher from pursuing a federal claim. The court rebuffed the district's contention that the teacher's complaint was subject to binding arbitration under the bargaining agreement. The court posited that the argument was without merit since the bargaining agreement contained a clause that exempted any matter for which a specific method of review is prescribed and expressly set forth by law or regulation of the State Commissioner of Education from arbitration.

A bus driver from Minnesota challenged her school district's denial of premium pay for a long route as violating title VII and the Equal Pay Act. On further review, the Eighth Circuit examined the relationship between federal anti-discrimination law and the driver's bargaining agreement. After initially asserting that the standards for such claims of unequal pay for equal work are the same under either federal statute, the court rejected the driver's suit for failure to state *prima facie* case of sex discrimination.[7] The dispute arose when, after the male who had the longest route for which the district paid an additional premium retired, the district re-configured its bus routes. In rejecting the woman's claim that she should have received the same premium since her new route incorporated some of the old one, the court observed that her route was within the two-hour limit specified by her bargaining agreement and that the only driver in the district to receive premium pay under the new routes was a female.

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[6] Thomas v. Contoocook Valley Sch. Dist., 150 F.3d 31 [128 Educ. L. Rep. 78](1st Cir. 1998).

[7] Kindred v. Northome/Indus. Sch. Dist. No. 363, 154 F.3d 801 [129 Educ. L. Rep. 67] (8th Cir. 1998).

Recognition and Representational Issues

The first of four cases on issues related to the recognition of employee associations and the scope of representation took place in Chicago over the enactment of legislation which prohibited assistant principals from joining the collective bargaining unit of teachers. Insofar as the assistant principals had long been members of the unit, both the union and district sought clarification from the Illinois Educational Labor Relations Board (IELRB). In the face of challenges by both the district and union, an appellate court in Illinois affirmed the logic and ruling of the IELRB.[8] The IELRB determined that assistant principals without full-time teaching duties were managerial employees who were ineligible for membership in the teachers' union. Conversely, the IELRB declared that even though some full-time teachers had the title of assistant principal and received stipends for duties they performed in the absence of the principal, they retained their rights to belong to the union.

Recognition of a collective bargaining agreement was at issue where a school district served students in grades 7-12 for area communities through an Authorized Regional Enrollment Agreement (AREA). When voters in those towns chose to convert the AREA into a cooperative district, the new district refused to honor the bargaining agreement between its predecessor and the teachers' union. The Supreme Court of New Hampshire reasoned that the terms of the previously negotiated contract applied to the new district.[9] The court contended not only that the teachers who worked for both the AREA and cooperative district were the same but also that the towns that had paid tuition to send their children to school under the AREA were aware of the agreement between the new district and the union. As such, the court considered the vote to enter into a cooperative district as a ratification of the existing agreements between the district and union.

The same court examined another recognition issue when a paraprofessional employee, who worked for a high school as a job coordinator helping students with disabilities find work in the community and assisting them in the transition from school to work, challenged the nonrenewal of her contract due to budgetary cutbacks. Even though the paraprofessional's contract was identical in many respects to that of a traditional teacher, the district refused to process his grievance since he did not have state certification. The Public Employee Labor Relations Board (PELRB) ruled in favor of the paraprofessional but, on further review, the Supreme Court of New Hampshire reversed.[10] The court was of the view that since the recognition clause of the bargaining unit clearly limited coverage to individuals with certification, the PELRB lacked authority to extend the agreement to the paraprofessional.

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[8] Chicago Teachers Union, IFT/AFT v. IELRB, 695 N.E.2d 1332 [127 Educ. L. Rep. 369] (Ill. App. Ct. 1998).

[9] Appeal of SAU No. 16 Co-op. Sch. Bd., 719 A.2d 613 [130 Educ. L. Rep. 808] (N.H. 1998).

In another New Hampshire case, the Supreme Court of New Hampshire explained that the PELRB's recognition of therapists under the contract between a district and its teachers' union could not withstand scrutiny.[11] The PELRB relied on the fact that the recognition clause of the contract, which was written in 1976, years before the district hired its first occupational therapist, indicated that the district covered all professionally certified personnel. However, occupational therapists are certified by the state Board of Registration of Medicine, not the education department. Insofar as the term professionally certified personnel was not further defined in the statute, the PELRB judged that it had jurisdiction over therapists. The court disagreed, finding that even the teachers' union had not always considered the therapists as union members because it acquiesced to having each therapist hired under a separate contract. Finally, in ascertaining that no attempts had ever been made to modify the contract to explicitly include therapists, the court was convinced that the PELRB's action was unsupported by the weight of evidence.

Rights and Obligations of Exclusive Bargaining Representatives

The only case examining the obligation of a union to its members originated in Illinois where a teacher who lost his job due to a reduction-in-force unsuccessfully challenged his dismissal. Among the grounds that the teacher raised was the allegation that his union failed its duty to represent him adequately in his grievance before the school board. The Seventh Circuit affirmed that the teacher could not raise a federal claim because political subdivisions, such as the school board, are specifically exempted under the definition of employer in the Labor Management Relations Act.[12]

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[10] Appeal of Somersworth Sch. Dist., 713 A.2d 386 [128 Educ. L. Rep. 276] (N.H. 1998).

[11] Appeal of Londonderry Sch. Dist., 707 A.2d 137 [124 Educ. L. Rep. 948](N.H. 1998).

Scope of Bargaining

Five cases addressed which issues are mandatory subjects of bargaining. At issue before the Supreme Court of Kansas was whether involuntary transfer language was a mandatory item for negotiation. The court refused to address the substantive issue in commenting that the state Professional Negotiations Act requires a union to first take its dispute to the Secretary of the Department of Human Resources.[13] In dismissing the dispute, the court reaffirmed its belief that the parties have the right to seek judicial review only after exhausting this avenue of relief.

When the Michigan Educational Special Services Association (MESSA), a nonprofit corporation that provides insurance benefits for members of the Michigan Education Association, changed its underwriter of health benefits, the shift affected a district whose collective bargaining agreement called for it to pay for health insurance for its teachers. MESSA's change not only increased the lifetime maximum of benefits but also raised the rate charged to the district. The modification led the district to file an unfair labor practice complaint against the teachers' union alleging that insofar as benefits were a mandatory issue of bargaining, the rate changes were improper. The Michigan Employment Relations Commission (MERC) and Supreme Court of Michigan held in favor of the district.[14] The court did not agree with the union's arguments that insufficient evidence supported the MERC's action or that the district waived its right by accepting an insurance certificate that reserved MESSA's right to modify or discontinue the group program. The court acknowledged that specific contract language indicated that the district reserved its right to bargain on these matters.

Snow days were the subject of a dispute in New Jersey. When a school district had to make up five days because of winter weather, it canceled three recess days during the spring semester and added two to the end of the year. The teachers union unsuccessfully challenged these changes as an unfair labor practice since the board did not negotiate the make-up days. A hearing officer and the Public Employment Relations

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[12] Strasburger v. Board of Educ. of Hardin County, 143 F.3d 351 [126 Educ. L. Rep. 577] (7th Cir. 1998).

[13] Junction City Educ. Ass'n v. Board of Educ., 955 P.2d 1266 [125 Educ. L. Rep. 1352] (Kan. 1998).

[14] St. Clair Intermediate Sch. Dist. v. MEA, 581 N.W.2d 707 [127 Educ. L. Rep. 1048] (Mich. 1998).

Commission (PERC) agreed with the district that the issue was non-negotiable. On further review, an appellate court reversed and remanded for further consideration in offering that while making changes in the school calendar was a non-negotiable management prerogative, the district may have been required to bargain with the union about the impact of calendar changes.[15] The court pointed out that the dispositve question was whether negotiating the impact would have significantly or substantially encroached on the managerial prerogative. The court suggested that if the answer to this question had been yes, then the issue would have been non-negotiable.

Where a school district employed a local board of cooperative educational services (BOCES) to meet its printing needs, one of its employee unions claimed that the matter should have been subject to mandatory collective bargaining. After the Public Employment Relations Board (PERB) dismissed the union's complaint, the union sought further review. A trial court in New York affirmed in favor of the PERB.[16] The court noted that the statutes governing the use of BOCES services negated any mandate for bargaining.

The reassignment of a teacher in Illinois who was not a member of a union prompted the consideration of when such a shift is subject to bargaining. Where an educator who was the only head teacher in her system was one of fourteen individuals who was transferred involuntarily, she would have lost a stipend for her administrative duties. Upon learning of her reassignment, she persuaded the board to reconsider her reassignment and instead transfer another more junior teacher. However, since the union did not have a representative at the session, it challenged the board's action as an improper denial of its mandatory bargaining rights related to involuntary transfers. The IELRB agreed with the union in remarking that the teacher's reassignment was subject to mandatory bargaining even though the board did not decide whether all changes should be treated in this manner. On further review, an appellate court affirmed in using a balancing test that weighed the benefits of bargaining against the burdens placed on an employer's authority.[17] The court was of the opinion that the situation could have been easily avoided if the teacher had been directed to take her complaint before the district's administrators as laid out in her collective bargaining agreement or had a union representative accompanied her to the board meeting.

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[15] Piscataway Educ. Ass'n v. Piscataway Township Bd. of Educ., 704 A.2d 981 [123 Educ. L. Rep. 764] (N.J. Super. Ct. App. Div. 1998).

[16] Vestal Employees Ass'n v. Public Employment Relations Bd., 667 N.Y.S.2d 658 [123 Educ. L. Rep. 871] (Sup. Ct. 1997).

[17] Sherrard Community Unit Sch. v. IELRB, 696 N.E.2d 833 [127 Educ. L. Rep.945] (Ill. App. Ct. 1998).

Grievability and Arbitrability

Eleven cases examined grievability and arbitrability. Eight actions focused on whether an issue was arbitrable, two centered on who determines arbitrability, and the final case examined a procedural issue related to arbitration.

Presumption and Arbitrability

One court considered the presumption of grievability of a principal's complaint of constructive discharge when it addressed whether portions of the state Teacher Tenure Act required her to exhaust administrative remedies under her collective bargaining agreement before seeking judicial relief. The Supreme Court of Connecticut asserted that exhaustion of remedies was not a requirement in this instance.[18] The court observed that in order for administrative remedies to have applied, the district first had to terminate the principal's contract. However, the court maintained that since the district failed to take this step, the principal was denied this avenue of redress. In addition, the court posited that after the principal resigned, which she maintains was compelled by the board's improper conduct toward her, and the agreement no longer applied to her, the claim of constructive discharge was properly before the courts.

In a second case from Connecticut, a court examined whether multiple grievances on the same issue constitute repudiation of a contract. When twenty-seven union members filed grievances contesting a change in a custodial contract that reduced the amount of overtime pay available to workers, the first seven were resolved in favor of the district. When the union rejected the request of the district's attorney that it withdraw the remaining complaints since they all dealt with the same basic question, the district filed a complaint with the state board of labor relations alleging that the union's activities effectively repudiated the contract. The labor board agreed and ordered the union to withdraw those issues from the remaining grievances and to pay the district's expenses. On further review, an appellate court affirmed in favor of the district.[19] The court agreed that the award of costs and expenses was well within the discretion of the labor relations board.

According to the Supreme Court of Vermont, a teacher who failed to use the grievance procedures in his collective bargaining agreement could not assert civil rights claims against his district.[20] The court declared that the teacher's allegation, that the district violated his due process rights under the Fourteenth Amendment, fell directly within the scope of his bargaining agreement. The court concluded that the teacher's failure to assert the prescribed rights in an administrative hearing was fatal to his other claims.

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[18] Mendillo v. Board of Educ. of East Haddam, 717 A.2d 1177 [129 Educ. L. Rep. 689] (Conn. 1998).

[19] AFSCME v. State Bd. of Labor Relations, 715 A.2d 803 [128 Educ. L. Rep. 1126] (Conn. App. Ct. 1998).

[20] Rich v. Montpelier Supervisory Dist., 709 A.2d 501 [125 Educ. L. Rep. 736] (Vt. 1998).

The Supreme Court of Rhode Island court affirmed that the nonrenewal of an untenured teacher's contract was not subject to arbitration since it was outside the scope of his collective bargaining agreement.[21] The court reasoned that while the bargaining agreement specifically addressed nonrenewal for non-tenured teachers for reasons of incompetency and effectiveness, it was silent with regard to the natural expiration of a contract.

Arbitrability was at issue in a case involving horizontal retroactivity when a school district and its teachers union entered into mediation after they failed to produce a successor contract. The mediator produced a handwritten settlement agreement that was signed by both parties. Yet, when the actual contract was prepared, the parties could not agree on whether teachers would receive retroactive pay for moving horizontally on the salary schedule upon completion of additional coursework. Subsequently, when eighteen teachers filed grievances over a three-year period, the board rejected the union's request that they enter arbitration to resolve the matter. The district responded that the issue was not arbitrable because the parties never reached a meeting of the minds on the provision. In finding that arbitrability was within the province of the arbitrator, the Pennsylvania Labor Relations Board (PLRB) ordered the district to submit to arbitration. On further review, an appellate court affirmed the PLRB's order in contending that the arbitrator had the sole and exclusive jurisdiction to construe the collective contract, including whether a matter is subject to arbitration.[22]

In the first of three cases from New York, an appellate court stated that a dispute over a school district's altering the work week of matrons from forty hours over five days to thirty hours over six days should first have been submitted to arbitration.[23] The court judged that the PERB had exclusive, nondelegable jurisdiction over the issue.

Another appellate court in New York concluded that an arbitrator should decide whether a union filed a complaint over a grievance in a timely manner.[24] The court was satisfied that since the dispute clearly centered on differing interpretations of a provision in a contract, it was properly subject to arbitration. Similarly, where a school district challenged an order requiring it to submit to arbitration, an appellate court in New York affirmed that whether a bargaining agreement applies to a particular employee is a question of contract interpretation for an arbitrator.[25]

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[21] Warwick Sch. Comm. v. Warwick Teachers' Union, 705 A.2d 984 [123 Educ. L. Rep. 1228] (R.I. 1998).

[22] Abington Heights Sch. Dist. v. Pennsylvania Labor Relations Bd., 709 A.2d 990 [125 Educ. L. Rep. 1282] (Pa. Commw. Ct. 1998).

[23] Roma v. Ruffo, 667 N.Y.S. 2d 500 [123 Educ. L. Rep. 857](App. Div. 1998).

[24] Dalton v. Schneider, 667 N.Y.S.2d 523 [123 Educ. L. Rep. 860] (App. Div. 1997).

Authority to Determine Arbitrability

A trial court's authority to determine arbitrability was at issue in Wisconsin in a dispute over a settlement agreement in which a teacher agreed to resign voluntarily if a three-member panel comprised of the superintendent, a school board member, and the president of the union could not agree unanimously that she should retain her job after a period of remediation. The agreement also stipulated that the decision of the panel was exempt from the grievance and arbitration procedures in the operative collective bargaining agreement. When the superintendent cast the sole vote against the teacher, pursuant to her agreement, she tendered a letter of resignation. However, when the teacher and union learned of statements that the superintendent allegedly made to parents of children in the teacher's class about his lack of desire to retain her, they sought to have the settlement agreement rescinded. After a trial court granted the district's motion for summary judgment on the ground that the issue was not arbitrable, an appellate panel affirmed.[26] The panel ascertained that since the settlement agreement was more specific than the bargaining contract and clearly exempted arbitration, the trial court was well within its jurisdiction in declaring that the agreement was non-arbitrable.

A school district in Ohio sought further review of an arbitration award calling for a one-month suspension without pay, rather than dismissal, for a school bus mechanic who tested positive for cocaine. The arbitrator was convinced that dismissal did not constitute just cause under the mechanic's collective bargaining agreement. A trial and an appellate court explained that the award should have been vacated on the basis of public policy.[27] The court agreed that both federal and state law are clearly written to suppress illegal drug use among transportation employees.

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[25] Board of Educ. v. Poughkeepsie Pub. Sch. Teachers Ass'n, 676 N.Y.S.2d 612 [128 Educ. L. Rep. 827] (App. Div. 1998).

[26] Kimberly Area Sch. Dist. v. Zdanovec, 586 N.W.2d 41 [130 Educ. L. Rep. 888] (Wis. Ct. App. 1998).

[27] Cleveland Bd. of Educ. v. International Brotherhood of Fireman & Oilers Local 701, 696 N.E.2d 658 [127 Educ. L. Rep. 411] (Ohio Ct. App. 1997).

Procedural Issues

A school board sought further review of a determination that it committed an unfair labor practice by hiring an outside contractor to perform electrical work. An appellate court in New York annulled an adjudication in favor of the union in ruling that since the association failed to file its claim within three months of the actual alleged improper employer practice, its complaint should have been dismissed as untimely.[28]

Judicial Review of Arbitration Awards

Twenty-two disputes led to requests for judicial review of arbitrator's awards. The most frequent challenges related to issues of salary and benefits and those of dismissal and nonrenewal of employees with seven cases in each category. Other cases involved issues of reassignment and hiring, whether a bargaining impasse had occurred, working conditions, reduction-in-force, and strikes.

Salary and Benefits

A school board appealed a finding of the state's Public Employee Labor Relations Board (PELRB) that it committed an unfair labor practice in a salary dispute over the interpretation of a collective bargaining agreement. After reaching a contract that included a lump sum payment, the board argued the payment was a bonus rather than a salary increase. The union responded that the money was a retroactive pay raise. The Supreme Court of New Hampshire affirmed that the union's position was supported by the evidence.[29]

In the first of three cases from New Jersey, an appellate court reviewed whether teachers who were transferred from one district to another as part of a consolidation of schools were entitled to reimbursement for unused sick leave. On appeal, the court held that teachers who are subject to an involuntary transfer are entitled to retain all of their sick leave when they transfer into a receiving district.[30]

A school board sought further review of a declaration from the PERC over the negotiability of a cap on unused, accrued sick leave. An appellate court in New Jersey affirmed that accumulated sick leave could not be divested through collective bargaining without the employees who would be adversely affected first knowingly and intentionally waiving their rights.[31]

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[28] Board of Educ. of the Union-Endicott Cent. Sch. Dist. v. New York Pub. Employment Relations Bd., 681 N.Y.S.2d 391 [131 Educ. L. Rep. 479] (App. Div. 1998).

[29] Appeal of Timberlane Reg. Sch. Bd., 713 A.2d 988 [128 Educ. L. Rep. 283] (N.H. 1998).

[30] Alford v. Board of Educ. of Buena Reg'l Sch. Dist., 708 A.2d 439 [125 Educ. L. Rep. 499] (N.J. Super. Ct. App. Div. 1998).

[31] Matter of Sch. Bd. of Morris, 708 A.2d 762 [125 Educ. L. Rep. 518] (N.J. Super. Ct. App. Div. 1998).

When a school system in New Jersey was taken over by the state, an administrator's association filed a grievance contesting entitlements to vacation days. Although the district's past practice of awarding unearned vacation days was inconsistent with the language of the collective bargaining agreement, the arbitration panel acted in favor of the association. On further review, a trial court affirmed in favor of the administrators but an appellate tribunal reversed.[32] The court explained that the arbitration panel exceeded its authority in permitting the past practices to, in effect, amend the bargaining agreement. The court added that since the law authorizing the state takeover granted strong powers to modify and amend the practices of failed local districts, its board was not bound by those past practices.

An appellate court in New York affirmed an adjudication of the PERB over the payment of cost-of-living increments to members of a teachers' union when their collective bargaining agreement with their school district expired.[33] The court agreed that the PERB had the statutory authority to determine the applicability of state law.

In a second case from New York, an appellate court reviewed a district's imposition of a co-payment for health insurance benefits on its retired employees. An arbitrator had remarked that while the contractual provision affecting current employees included a co-pay obligation, it did not address retirees. The court affirmed that the contract did not provide a basis for the district's action.[34]

According to an appellate court in Kansas, a teacher was not entitled to additional compensation for college credits earned beyond a bachelor's degree.[35] The court wrote that the term "teacher," as used in collective bargaining contracts, applied only to persons who have basic teaching certificates. The court noted that credits taken after receiving a baccalaureate degree, but that are necessary for certification, do not count for purposes of advancement on the salary scale.

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[32] City Ass'n of Supervisors and Adm'rs v. State Operated Sch. Dist. of Newark, 709 A.2d 1328 [126 Educ. L. Rep. 243] (N.J. Super. Ct. App. Div. 1998).

[33] Greece Support Serv. Employees Ass'n v. Public Employment Relations Bd., 672 N.Y.S.2d 926 [126 Educ. L. Rep. 371 (App. Div. 1998).

[34] Matter of Elmira Heights Sch. Dist., 672 N.Y.S.2d 952 [126 Educ. L. Rep. 377] (App. Div. 1998).

[35] Schmidt v. Board of Educ., U.S.D. No. 322, 951 P.2d 960 [123 Educ. L. Rep. 1296] (Kan. Ct. App. 1997).

Working Conditions

When a school district developed a detailed educational plan for teaching about controversial books, an arbitrator agreed with a teacher that this exceeded the board's authority to set curriculum by infringing on the rights of instructors to use their own methodologies. On further review, the Supreme Judicial Court of Maine reversed in favor of the board.[36] The court concluded that the plan comported with the board's established policy regarding controversial reading materials and reflected the types of value choices that it was authorized to make on behalf of the public it served. The court believed that since the plan only had an incidental impact on teaching techniques, it did not implicate working conditions.

Dismissal and Nonrenewal

Both sides sought further review in a dispute where a teacher's contact was not renewed when he took part in an organized attempt by union members to ostracize staff members who crossed the picket line during a strike. The Supreme Court of Ohio affirmed that when the judiciary is confronted with whether a board has committed an unfair labor practice, a teacher bears the initial burden of showing that it took an adverse action in response to the educator's exercising the right to freedom of association.[37] Further, the court remanded in agreeing that the SERB has exclusive jurisdiction as to whether the board committed an unfair labor practice.

In Indiana, a school board sought further review of an arbitration award that reinstated a teacher whose contract was not renewed. The arbitrator for the action indicated that the principal failed to offer an adequate rationale on the evaluation form. An appellate tribunal affirmed an earlier reversal in favor of the board.[38] The court observed that the principal met the requirements of the evaluation by using the form and an attached narrative. The court pointed out that while some of the statements might have been barely sufficient, they clearly met the requirements in the teacher's collective bargaining agreement.

A discharged probationary teacher fared better before an appellate court in Oregon. When the teacher asserted her right under her contract to bring a representative of her choice to a meeting with potential disciplinary consequences, the Employment Relations Board (ERB) decreed that she was ultimately dismissed for engaging in this form of protected activity.[39] The court rejected the board's argument that the ERB expanded the status of protected activity to include concerted activity of an employee who was seeking to enforce his or her own rights.

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[36] School Admin. Dist. No. 58 v. Mount Abram Teachers Ass'n, 704 A.2d 349 [123 Educ. L. Rep. 255] (Me. 1997).

[37] Fort Frye Teachers Ass'n, OEA/NEA v. State Employment Relations Bd., 692 N.E.2d 140 [124 Educ. L. Rep. 684 (Ohio 1998).

[38] Tippecanoe Educ. Ass'n v. Tippecanoe Sch., 700 N.E.2d 241 [129 Educ. L. Rep. 769] (Ind. Ct. App. 1998).

Similarly, an appellate court in New York affirmed an arbitration award that reinstated a probationary teacher whose contract was terminated.[40] The court rejected the district's claim that the award should have been vacated because the arbitrator erred in calculating the date on which the teacher began his fourth year of employment. The court also rebuffed the board's arguments that public policy demanded that the award be vacated as lacking merit and improperly raised for the first time on appeal.

In a second case from New York, an appellate court considered whether a bus driver was entitled to a hearing before dismissal in light of a provision in her collective bargaining agreement that stated that an absence without leave in excess of ten days would constitute constructive resignation. The court reversed in deciding that the provision did not entitle the driver either to prior notice or a hearing because due process was satisfied by the bargaining process that produced the contract language.[41]

An appellate court in Minnesota reversed the dismissal of a principal's claim that his contract was wrongfully nonrenewed.[42] The court maintained that since the principal was tenured as a school counselor, state law did not subject him to a new probationary period when he was named principal. The court posited that once the district issued the contract, it was equitably estopped from claiming that the principal lacked appropriate licensure when he was appointed.

When a school district in Pennsylvania dismissed a custodian for repeatedly ignoring warnings not to arrive early at work, his union challenged its action as lacking just cause. After an arbitrator called for the custodian's reinstatement, a trial court vacated the order. On further review, an appellate court asserted that while the bargaining agreement allowed dismissal only for just cause, it did not define this term.[43] As such, the court reversed, acknowledging that the arbitrator was within his authority in evaluating whether the work rule regarding arrival time was reasonable and whether the district's ground for dismissal met the just cause standard.

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[39] Central Sch. Dist. 13J v. Central Educ. Ass'n, 962 P.2d 763 [128 Educ. L. Rep. 1274] (Or. Ct. App. 1998).

[40] Board of Educ. of Hempstead Union Free Sch. Dist. v. Hempstead Classroom Teachers Ass'n, 674 N.Y.S.2d 712 [127 Educ. L. Rep. 962] (App. Div. 1998).

[41] Barrera v. Frontier Cent. Sch. Dist., 672 N.Y.S.2d 218 [125 Educ. L. Rep. 1332](App. Div. 1998).

[42] Lucio v. School Bd. of Indep. Sch. Dist. No. 625, St. Paul, Minn., 574 N.W.2d 737 [124 Educ. L. Rep. 393] (Minn. Ct. App. 1998).

[43] School Dist. of Springfield Township v. Springfield Township Educ. Support Personnel Ass'n, 711 A.2d 602 [126 Educ. L. Rep. 1073](Pa. Commw. Ct. 1998).

Reassignment and Hiring Issues

When a teacher with more than twenty years of involvement in extracurricular activities was passed over for a job as athletic director in lieu of an individual who was not certified, a school district sought further review of a declaration that it violated its collective bargaining agreement. An appellate court in Pennsylvania affirmed in favor of the teacher.[44] The court rejected the district's argument that staffing the position of athletic director was not arbitrable under the bargaining agreement. The court responded that insofar as the bargaining agreement grants a person with professional status the right of preference when competing with a non-certified individual for an extracurricular position, the arbitrator acted properly.

A teacher's aide challenged the denial of her petition which claimed that the board violated her collective bargaining agreement by hiring another applicant for the job. The aide argued that under the agreement, the board should have hired her based on a provision that required it to select the candidate with most seniority if there are two or more relatively equal applicants. An appellate court in New York affirmed in favor of the board.[45] The court explained that the arbitrator's judgment was irrational since he had not weighed whether the two candidates were, in fact, equally qualified.

In Ohio, an appellate court reinstated an arbitration award in favor of an employee who was denied part-time appointments as a bus garage worker and driver due to concerns over safety since he admitted to having had a drinking problem and underwent treatment in a rehabilitation program. At the time of the opening, the employee admitted to the superintendent that he occasionally had a beer in his home. The court agreed with the arbitrator that since the district's reasoning was wanting, the employee should have been granted the jobs insofar as such a result was a reasonable interpretation of his collective bargaining agreement.[46]

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[44] Cranberry Area Sch. Dist. v. Cranberry Educ. Ass'n, 713 A. 2d 726 [127 Educ. L. Rep. 923] (Pa. Commw. Ct. 1998).

[45] *In Re* Recore (Chateaugay Cent. Sch. Dist.), 681 N.Y.S.2d 621 [131 Educ. L. Rep. 488] (App. Div. 1998).

[46] Barnesville Exempted Village Bd. of Educ. v. Barnesville Ass'n of Classified Employees, 704 N.E.2d 36 [131 Educ. L. Rep. 500](Ohio Ct. App. 1997).

Reduction-in-Force

A school board appealed an arbitration award which reasoned that a teacher was improperly denied an appointment to an open position after it eliminated his job, but failed to address back pay and reinstatement. On further review, the Supreme Court of Vermont was unpersuaded by the board's argument that it could not confirm the arbitration award until these calculations were completed.[47] The court severed the award from the decision on the merits in vacating the former and confirming the latter. At the same time, the court remanded the dispute for a consideration of the specific amount of the award.

Impasse

Where a school board declared an impasse and laid off bus drivers following a break down in negotiations with the union, the Supreme Court of Ohio reversed in favor of the union.[48] The court maintained that since the union properly invoked the protection of state law a month before the board declared an impasse, state law precluded the school system from using its discretion to lay-off full-time employees for economic reasons. The court concluded that since the drivers kept their rights to continued employment under the statute, they were entitled to reinstatement and back pay.

The impact of good faith bargaining on the declaration of an impasse was at issue when a teachers' union filed a complaint with the Maine Labor Relations Board (MLRB). The complaint was addressed at the same time that the union rejected the recommendation of the Maine Board of Arbitration and Conciliation that the parties adopt the school committee's salary proposal. The union's rejection of the recommendation led the school committee to declare an impasse while invoking the proposed salary schedule as its last, best offer. When the union amended its complaint, the MLRB ordered the school committee to pay all of the costs of arbitration since it declared an impasse even though it failed to bargain in good faith. On further review, the Supreme Judicial Court of Maine affirmed that the MLRB had sufficient evidence to find that the committee not only failed to bargain in good faith but also that it improperly declared an impasse.[49] However, the court vacated the order directing the school committee to pay arbitration costs since state law clearly indicated such expenses must be shared.

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[47] Springfield Teachers Ass'n v. Springfield Sch. Dirs., 705 A.2d 541 [123 Educ. L. Rep. 1205] (Vt. 1997).

[48] State *ex. rel.* Boggs v. Springfield Local Sch. Dist. Bd. of Educ., 694 N.E.2d 1346 [125 Educ. L. Rep. 1337](Ohio 1998).

[49] Minot Sch. Comm. v. Minot Educ. Ass'n, 717 A.2d 372 [129 Educ. L. Rep. 424] (Me. 1998).

Strikes

A school board in Illinois challenged an order of the IELRB that denied its request for an injunction to prevent a strike. An appellate court dismissed the board's petition on the basis that the action of the IELRB was not a final order which could be appealed.[50]

Miscellaneous

In the first of five cases that did not fall into any of the above categories, plaintiffs in a consolidated appeal challenged a borough's requirement that successful bidders on a high school construction project enter into a project labor agreement with local unions. The plaintiffs argued that this practice violated the state constitution and the borough's procurement code. On further review, the Supreme Court of Alaska vacated and reversed in part and affirmed in part.[51] The court held that the project labor agreement did not violate the equal protection or freedom of association rights of non-union workers because there was a close nexus between it and the borough's important interests. The court contended that the agreement did not violate the mandates of the borough's procurement code due to special challenges that this construction project presented.

The Supreme Judicial Court of Massachusetts examined whether a teacher who submitted her claim that her contract was not renewed in retaliation for having filed a charge of sexual harassment was precluded from seeking statutory relief. The court rejected the board's argument that the suit should have been dismissed under three theories it presented.[52] First, the court refused to accept the premise that arbitration prevented the teacher from filing suit. The court offered that since arbitration is limited to contractual disputes, the teacher was free to pursue judicial remedies. Second, the court could not find any merit in the board's claim that participation in arbitration effectively waived the right to sue. Third, the court rejected the district's theory that the teacher was judicially estopped from pursuing her claim.

Female cafeteria workers unsuccessfully challenged the denial of their claim that their school system violated the Massachusetts Equal Pay Act (MEPA) because they earned less than male custodians. The Supreme Judicial Court of Massachusetts affirmed an earlier judgment in favor of the school committee. In ascertaining that even though some aspects of the jobs were similar, the court did not agree that they had an actionable claim under the MEPA because the positions were not comparable.[53]

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[50] Niles Township High Sch. Dist. 219 Bd. of Educ. v. Niles Township Fed'n of Teachers, Local 1274, 692 N.E.2d 700 [125 Educ. L. Rep. 538] (Ill. App. Ct. 1997).

[51] Laborers Local No 942 v. Lampkin, 956 P.2d 422 [126 Educ. L. Rep. 437] (Alaska 1998).

[52] Blanchette v. School Comm. of Westwood, 692 N.E.2d 21, [124 Educ. L. Rep. 677] (Mass. 1998).

A teacher sought further review of the denial of her request to confirm an arbitration award that ordered a school district to restore employees of a day care program with back pay and vacation pay. Even though the PLRB made the order absolute and final, the district only paid unused vacation pay and did not honor it in any other respect. An appellate court in Pennsylvania affirmed that the employee did not have standing to seek redress.[54] The court was of the view that only the PLRB had standing to seek the enforcement of its order.

In a second case from Pennsylvania, a district and union challenged a grant of summary judgment in favor of teachers who sought to receive all of their years of experience when they were transferred from an intermediate unit to a district. The controversy arose when the district chose to use its own teachers for visually and hearing impaired students rather than purchase services from the intermediate unit. An appellate court reversed on the ground that the statute was not intended to grandfather in provisions of a collective bargaining agreement.[55] Rather, the court noted that since state law was intended to limit the use of such agreements, the teachers were only entitled to the credit that the receiving district granted them upon their transfers.

Conclusion

As the above cases illustrate, the range of issues affecting the relationship between schools and the unions of their employees is broad and diverse. The number and variety of disputes indicates that collective bargaining units are fierce defenders of their members' rights and that schools just as fiercely try to preserve management prerogatives. The cases also demonstrate that judicial assistance is frequently sought to settle disputes between parties even though that scope of review is severely limited in many instances. No discernible trends identified new or emerging issues in the relationship between districts and their unions. Rather, the cases reveal the continuing efforts of courts to craft resolutions to issues that have long been a part of the employer-employee relationship in educational settings.

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[53] Jancey v. School Comm. of Everett, 695 N.E.2d 194 126 Educ. L. Rep. 1103] (Mass. 1998).

[54] Christian v. School Dist. of Philadelphia, 722 A.2d 236 [131 Educ. L. Rep. 792] (Pa. Commw. Ct. 1998).

[55] Corbett v. Scranton Sch. Dist., 704 A.2d 709 [123 Educ. L. Rep. 273] (Pa. Commw. Ct. 1997).

5

STUDENTS WITH DISABILITIES

Allan G. Osborne, Jr.

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Introduction

Litigation over the rights of students with disabilities continued at a significant pace in 1998. As in the past, many of the cases involved procedural issues, dispute resolution, and contested placements under the Individuals with Disabilities Education Act (IDEA).[1] Historically, in many of the actions, the courts were asked to determine whether school districts had offered students free appropriate public educations. During 1998 a few suits emerged in which provisions of the 1997 Amendments to the IDEA were contested.[2]

Each year, cases are also filed on behalf of students with disabilities under section 504 of the Rehabilitation Act[3] and the Americans with Disabilities Act (ADA).[4] In most of these suits the plaintiffs alleged that the students were subjected to discriminatory treatment on the basis of their disabilities or that school systems failed to accommodate their needs.

Entitlement to Services

The IDEA requires school districts to provide students with disabilities with a free appropriate public education (FAPE), consisting of any needed special education and related services.[5] Yet, the IDEA does not establish any substantive standards by which those services can be judged to be adequate. The IDEA provides that students must be afforded specially designed instruction[6] in conformance with their Individualized Education Programs (IEP).[7] The Supreme Court has held that a student with disabilities is entitled to personalized instruction with support services sufficient to permit the child to benefit from the education provided.[8] At the same time, lower courts have been cautioned not to impose their views of preferable educational methods on districts.[9] However, the courts are frequently asked to decide what level of services is required to meet the IDEA's minimum standards. Students attending private schools also are entitled to some benefits under the IDEA.[10]

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[1] 20 U.S.C. § 1400 et seq.

[2] P.L. 105-17.

[3] 29 U.S.C. § 794.

[4] 42 U.S.C. §§ 12101 - 12213.

[5] 20 U.S.C. §§ 1401(8) and 1412(a)(1)A).

[6] 20 U.S.C. § 1401(25).

[7] 20 U.S.C. §§ 1401(11) and 1414(d).

[8] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[9] *Id.*

[10] 20 U.S.C. § 1412(a)(10)(A)(i).

Questions sometimes emerge regarding a child's eligibility for special education. One of the more contentious categories of disabilities in the IDEA is that of seriously emotionally disturbed children.[11] In a case from Virginia, the Fourth Circuit ruled that a student who exhibited socially maladjusted behavior was ineligible to receive services under the classification of seriously emotionally disturbed.[12] On the other hand, the Second Circuit found that a student from New York who had an inability to learn that could not be explained solely by intellectual, sensory, or health factors and whose emotional difficulties adversely affected her educational development was entitled to special education.[13] The student also exhibited a pervasive mood of unhappiness, depression, and despondency as evidenced by a suicide attempt. The court added that the child exhibited inappropriate types of behavior under normal circumstances such as lying, cutting classes, failing to complete assignments, stealing, and defiance.

The federal district court in Maryland decreed that a student who scored at the borderline level on intelligence tests and who academically performed well below her chronological age was ineligible for special education.[14] The district had classified the student as a slow learner who was only entitled to regular education. The court agreed with the school district, reasoning that the IDEA's criteria for classification as mentally retarded required scores significantly below average in general intellectual functioning.

Several suits dealt with the issue of providing special education and related services to students whose parents voluntarily enrolled them in private schools, some of which were sectarian. Insofar as some of these suits arose before the passage of the 1997 IDEA Amendments, they were resolved in accordance with the pre-amendment statute. However, since other cases involved forms of prospective relief, they were decided on the basis of the amended IDEA.

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[11] Seriously emotionally disturbed is defined in the regulations as "a condition that exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; or (E) A tendency to develop physical symptoms or fears associated with personal or school problems." However, the term does not apply to children who are socially maladjusted unless they are also determined to be seriously emotionally disturbed. 34 C.F.R. § 300.7(a)(9).

[12] Springer v. Fairfax County Sch. Bd., 134 F.3d 659 [123 Educ. L. Rep. 478] (4th Cir. 1998).

[13] Muller v. Committee on Special Educ. of the East Islip Union Free Sch. Dist., 145 F.3d 95 [127 Educ. L. Rep. 36] (2d Cir. 1998).

[14] Carter v. Prince George's County Pub. Schs., 23 F. Supp.2d 585 [130 Educ. L. Rep. 1176] (D. Md. 1998).

The Eighth Circuit indicated that prior to the passage of the 1997 IDEA Amendments, a student in a parochial school was entitled to receive special education.[15] Insofar as the district in Minnesota had a long-standing policy and practice of providing services to students with disabilities in private nonreligious schools and home schools, the court noted that not providing similar services on the premises of a parochial school was a mere pretext for religious discrimination. At the same time, in terms of prospective relief, the court explained that the amended IDEA did not give the student the right to receive district funded services at the parochial school.

Following the passage of the 1997 IDEA Amendments, the Supreme Court remanded a case from the Second Circuit that originated in New York.[16] On remand, the court commented that the amended IDEA does not require a district to expend its own funds on children with disabilities whose parents voluntarily enrolled them in private schools.[17] Rather, the court observed that a district is only required to provide services that can be purchased with a proportionate amount of the federal funds they receive under the IDEA. The court concluded that the IDEA does not require a district to provide on-site services to a student with a disability whose parents voluntarily enroll their child in a private school. Similarly, the Eighth Circuit declared that since the amended IDEA did not confer an individual right on a student from Missouri to receive special education and related services, she could not demand that they be delivered at a particular location.[18] A federal trial court in Wisconsin, in positing that a district was not required to provide a sign language interpreter for a student with a disability who attended a parochial school, contended that the 1997 IDEA Amendments confirmed that such services need not be provided on the premises of a private school.[19]

Although several of the above cases maintain that a district is not required to provide special education services on-site at a private school, it is not prohibited from doing so even if the private school is sectarian. The Sixth Circuit judged that under *Agostini v. Felton*,[20] a district in Michigan lacked a valid argument that it would have violated the establishment clause by delivering therapeutic services at a parochial school.[21] The court ascertained that providing services did not constitute impermissible supplanting since there was no evidence that they would otherwise have been offered by the parochial school.

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[15] Peter v. Wedl, 155 F.3d 992 [129 Educ. L. Rep. 594] (8th Cir. 1998).

[16] Russman v. Sobol, 85 F.3d 1050 (2d Cir. 1996), *vacated and remanded* 117 S. Ct. 2502 (1997) (mem.).

[17] Russman v. Mills, 150 F.3d 219 [128 Educ. L. Rep. 576] (2d Cir. 1998).

[18] Foley v. Special Sch. Dist. of St. Louis County, 153 F.3d 863 [128 Educ. L. Rep. 1049] (8th Cir. 1998). *See also* Peter v. Wedl, 155 F.3d 992 [129 Educ. L. Rep. 594] (8th Cir. 1998).

[19] Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ., 996 F. Supp. 855 [126 Educ. L. Rep. 164] (E.D. Wis. 1998).

[20] 117 S. Ct. 1997 [119 Educ. L. Rep. 29] (1997).

[21] Peck v. Lansing Sch. Dist., 148 F.3d 619 [127 Educ. L. Rep. 729] (6th Cir. 1998).

According to a federal district court in Tennessee, graduation from high school may end a student's eligibility for special education services.[22] In pointing out that the student's graduation evinced his successful completion of the school's academic requirements, the court believed that he failed to show that his claim for additional services was anything more than a request for extra psychiatric, social, and emotional aid beyond what he already received.

Procedural Safeguards

The IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed consistent with its mandates.[23] The IDEA states that the parents or guardian of a student with disabilities must be provided with the opportunity to participate in the development of the IEP for their child and the child's placement.[24] The IDEA further requires districts to provide written notice and obtain parental consent prior to evaluating a child[25] or making an initial placement.[26] Once a student has been placed in special education, a district must provide parents or guardians with proper notice before initiating a change in placement.[27] Subsequently, a student's situation must be reviewed at least annually[28] and the child must be reevaluated at least every three years.[29]

Under the IDEA, the parents of a student with disabilities may be entitled to an independent evaluation at public expense if they disagree with a district's evaluation.[30] At the same time, the district may challenge the request for an independent evaluation in an administrative hearing. If the result of an appeal is that a district's evaluation was appropriate, the parents are not entitled to an independent evaluation at public expense.[31]

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[22] Daugherty v. Hamilton County Schs., 21 F. Supp.2d 765 [130 Educ. L. Rep. 715] (E.D. Tenn. 1998).

[23] 20 U.S.C. § 1415.

[24] 20 U.S.C. §§ 1414(d)(1)(B)(i) and 1414(f).

[25] 20 U.S.C. § 1414(a)(1)(C).

[26] 20 U.S.C. § 1415(b)(3).

[27] 20 U.S.C. § 1415(b)(3)(A).

[28] 20 U.S.C. § 1414(d)(4)(A).

[29] 20 U.S.C. § 1414(a)(2)(A).

[30] 20 U.S.C. § 1415(b)(1).

[31] 34 C.F.R. § 300.503(b).

The IDEA stipulates that an IEP must contain statements of a student's current educational performance, annual goals and short-term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine whether the objectives are being met.[32] An IEP must also include statements concerning how the student's disability affects his or her ability to be involved in and progress in the general educational curriculum, along with statements regarding modifications that may be needed to allow the child to participate in the general curriculum.

Evaluation and Classification

A federal trial court in Illinois was of the opinion that a district had the right to evaluate a student who had been unilaterally enrolled in an out-of-state residential facility by his mother.[33] The court rejected the mother's suggestion that the district either develop an IEP based on outside evaluations or send its personnel to the out-of-state facility to evaluate the student.

The Fourth Circuit ruled that a student from Virginia was not seriously emotionally disturbed.[34] The court was persuaded by the testimony of three psychologists who examined the student and acknowledged that he was not seriously emotionally disturbed. The court offered that a drop in the student's grades was directly attributable to his truancy, drug and alcohol use, and delinquent behavior rather than any emotional disturbance.

The Tenth Circuit affirmed that a district in Kansas complied with the IDEA in assessing a student in all areas related to his suspected disability.[35] The court added that the evaluation was conducted by a multidisciplinary team that possessed the requisite professional skills. However, a federal trial court in Illinois held that a district's failure to complete a learning disabilities evaluation requested by the student's mother was a serious error that resulted in inconsistent and inadequate programming for her reading difficulties.[36]

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[32] 20 U.S.C. § 1414(d)(1)(A).

[33] Patricia P. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200, 8 F. Supp.2d 801 [128 Educ. L. Rep. 249] (N.D. Ill. 1998).

[34] Springer v. Fairfax County Sch. Bd., 134 F.3d 659 [123 Educ. L. Rep. 478] (4th Cir. 1998).

[35] Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 153 F.3d 727 [129 Educ. L. Rep. 37] (10th Cir.) (mem.), *aff'g* 959 F. Supp. 1338 [118 Educ. L. Rep. 147] (D. Kan. 1997).

[36] Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F. Supp.2d 862 [130 Educ. L. Rep. 726] (N.D. Ill. 1998).

Rights of Parents or Guardians

In Florida, a federal district court mandated that a student's rights of majority did not transfer to him when he reached the age of adulthood under state law.[37] Following his incarceration after having been adjudicated as an adult, the school system developed an IEP for the student without the participation of his parents. The Department of Corrections unsuccessfully claimed that the student had the transferred right of majority because he was incarcerated as an adult.

A district may appoint a surrogate parent to represent a student in certain situations where a parent is unavailable.[38] The federal trial court in Wyoming decided that insofar as neither federal nor state regulations prohibited a student's foster parents, who were related to him, from acting as his parents for purposes of the IDEA, the district did not have to appoint a surrogate parent.[39]

In spite of the parents' claims to the contrary, the federal district court in Puerto Rico was satisfied that the department of education met its duty to provide them with written notification of their rights after the department presented the judge with a copy of the notice of rights that the parents signed.[40] However, the court indicated that the department's failure to conduct the requested due process hearing in a timely manner violated the parents' rights.

A district court in Tennessee rejected a father's claim of inadequate notice of an IEP meeting after finding that he called for and attended the meeting in question.[41] Further, the court noted that the father actively and knowingly participated in every aspect of the student's IEP while the student attended the school.

Development of Individualized Education Programs

In the first of two cases from the Tenth Circuit that originated in Kansas, the court decreed that while an IEP that did not clearly convey the student's present levels of educational performance, it did refer to reports that contained that information.[42] As such, the court was convinced that the IEP did not violate the standards set by the IDEA and state law since the student's parents and teachers were fully aware of her levels of functioning. In addition, the court contended that insofar as IEPs are not expected to provide the level of detail generally contained in monthly instructional plans, the goals and objectives stated in the IEP were adequate. Similarly, the court affirmed an IEP that contained all of the elements required by federal and state laws.[43] The court agreed that the IEP contained annual goals adequately describing the student's anticipated performance for the upcoming year, measurable short-term objectives, clearly stated criteria for measuring progress, and evaluation procedures. At the same time, a federal trial court in Missouri found that a district developed IEP was designed to meet the student's specific educational needs in accordance with the IDEA's requirements.[44]

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[37] Paul Y. by Kathy Y. v. Singletary, 979 F. Supp. 1422 [122 Educ. L. Rep. 652] (S.D. Fla. 1977).

[38] 34 C.F.R. § 300.514.

[39] Converse County Sch. Dist. No. Two v. Pratt, 993 F. Supp. 848 [125 Educ. L. Rep. 407] (D. Wyo. 1997).

[40] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

[41] Daugherty v. Hamilton County Schs., 21 F. Supp.2d 765 [130 Educ. L. Rep. 715] (E.D. Tenn. 1998).

[42] O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 [126 Educ. L. Rep. 673] (10th Cir. 1998), *aff'g* 963 F. Supp. 1000 [118 Educ. L. Rep. 676] (D. Kan. 1997).

The federal trial court in New Jersey asserted that although an IEP did not contain a statement of the student's current levels of educational performance, the evaluations that were presented at the meeting in which the IEP was drafted did include such a description.[45] Even so, the court reflected that the IEP did not meet the IDEA's standards as it did not contain the required components of measurable short-term objectives and evaluation criteria.

A federal trial court in Tennessee declared that a school did not violate the IDEA when a student's teacher was not present at an IEP meeting.[46] The court posited that the alleged procedural violation failed because persons knowledgeable about the student attended the meeting.

Change in Placement

The Fifth Circuit, in a case from Louisiana, affirmed that a trial court did not abuse its discretion by observing that a final administrative order constituted an agreement between the state and the parents such that it became the basis for the then current placement even though the related litigation had been appealed.[47]

A federal district court in Illinois reasoned that once a state administrative agency is content that the parents' chosen placement is appropriate, it becomes the then current placement within the meaning of the IDEA's stay put provision.[48] Consequently, the court commented that a final administrative action constituted agreement by the state to the changed placement.

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[43] Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 153 F.3d 727 [129 Educ. L. Rep. 37] (10th Cir.) (mem.), *aff'g* 959 F. Supp. 1338 [118 Educ. L. Rep. 147] (D. Kan. 1997).

[44] Breen v. St. Charles R-IV Sch. Dist., 2 F. Supp.2d 1214 [127 Educ. L. Rep. 133] (E.D. Mo. 1997).

[45] D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457 [123 Educ. L. Rep. 622] (D.N.J. 1977).

[46] Daugherty v. Hamilton County Schs., 21 F. Supp.2d 765 [130 Educ. L. Rep. 715] (E.D. Tenn. 1998).

[47] St. Tammany Parish Sch. Bd. v. State of Louisiana, 142 F.3d 776 [126 Educ. L. Rep. 76] (5th Cir. 1998).

Dispute Resolution

If parents disagree with any of a district's justifications supporting a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing.[49] Any party not satisfied with the final outcome of administrative proceedings may appeal to the state or federal courts.[50] However, all administrative remedies must be exhausted before filing suit unless it is futile to do so. While an administrative or judicial action is pending, a district may not change a student's placement absent parental consent,[51] a hearing officer's order,[52] or a judicial decree.[53]

The IDEA empowers the courts to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.[54] Yet, judges have been cautioned not to substitute their views of proper educational methodology for those of competent school authorities.[55] Insofar as the IDEA does not contain a statute of limitations for filing a suit, courts must borrow one from analogous state laws.

In 1997, Congress amended the IDEA by providing for the resolution of disputes through mediation as an alternative to an adversarial proceeding.[56] However, as mediation is voluntary, it may not be used to deny or delay a parent's right to an administrative hearing.

The IDEA is not the exclusive avenue through which parents may enforce the rights of children with disabilities. The IDEA specifically stipulates that none of its provisions can be interpreted to restrict or limit the rights, procedures, and remedies available under the Constitution, section 504, or other federal statutes protecting the rights of students with disabilities.[57] In addition to the IDEA, suits are frequently filed under section 504, the ADA, and section 1983 of the Civil Rights Act of 1871.[58]

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[48] Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois Bd. of Educ., 10 F. Supp.2d 971 [128 Educ. L. Rep. 1052] (N.D. Ill. 1998).
[49] 20 U.S.C. §§ 1415(f)(g).
[50] 20 U.S.C. § 1415(i)(2)(B).
[51] 20 U.S.C. § 1415(j).
[52] 20 U.S.C. § 1415(k)(2).
[53] Honig v. Doe, 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).
[54] 20 U.S.C. § 1415(i)(2)(B).
[55] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).
[56] 20 U.S.C. § 1415(e).

Administrative Hearings

In a 1996 case that was only reported recently, a federal trial court in Alabama pointed out that a parent who reached a settlement agreement with a district had not exhausted administrative remedies when she filed suit over the child's placement.[59] Even though the settlement agreement had been reached before the hearing started, the court believed that it did not fulfill the purposes of administrative review.

A federal district court in West Virginia dismissed a suit for failure to exhaust administrative remedies in contending that a student would not have suffered irreparable harm in the time it would take the plainfiffs to exhaust all remedies.[60] At the same time, a federal trial court in Michigan explained that parents who removed their child from their home district were not excused from the exhaustion requirement.[61]

The Supreme Court of Appeals of West Virginia stated that the parents of an autistic child were not required to exhaust administrative remedies before filing suit for damages due to his alleged injuries.[62] Although the child was disabled, the court ascertained that the litigation was essentially a damage claim unrelated to the purposes of the IDEA.

According to a federal trial court in Illinois, the doctrine of claim preclusion barred the parties from relitigating the same issues in a second due process hearing.[63] Rather than appealing an unfavorable administrative order to the courts, a parent had requested a second due process hearing. The court determined that the hearing officer was wrong to have rejected the district's motion to dismiss on the ground of preclusion as nothing in the IDEA gives parents the right to a second due process hearing on the same issues.

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[57] 20 U.S.C. § 1415(l).

[58] 42 U.S.C. § 1983.

[59] Hamilton v. Board of Sch. Commr's of Mobile County, 993 F. Supp. 884 [125 Educ. L. Rep. 429] (S.D. Ala. 1996).

[60] Tyson v. Kanawha County Bd. of Educ., 22 F. Supp.2d 535 [130 Educ. L. Rep. 779] (S.D. W.Va. 1997).

[61] Franklin v. Frid, 7 F. Supp.2d 920 (W.D. Mich. 1998).

[62] Ronnie Lee S. v. Mingo County Bd. of Educ., 500 S.E.2d 292 [126 Educ. L. Rep. 506] (W.Va. 1997).

[63] Patricia P. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200, 8 F. Supp.2d 801 [128 Educ. L. Rep. 249] (N.D. Ill. 1998).

The Eighth Circuit affirmed that a student in Minnesota who moved from one school system to another was not entitled to a due process hearing on an IEP developed by his former district.[64] The court maintained that the student lacked a cause of action because his request for the hearing came after he had left the district. Thus, the court was of the opinion that the student's claim was moot. In another case from Minnesota, the federal trial court acknowledged that a student was not entitled to a due process hearing where his attorney requested it in the same letter which asked for an evaluation and preparation of an IEP.[65] The court offered that no issue was ripe for a hearing.

A federal trial court in Alabama ruled that the expedited hearing provision of the 1997 IDEA Amendments[66] does not require a school district to exhaust administrative remedies prior to seeking a judicial order to remove allegedly dangerous students.[67] The court indicated that resorting to a hearing was optional since the provision states that a district may seek a hearing.

Court Proceedings

Courts were asked to consider whether a number of cases were moot. The First Circuit held that a case or controversy no longer existed after a student from Massachusetts who sought a classroom aide in a private school enrolled in a public school.[68] However, where a district sought to suspend two students, a federal trial court decided that the case was not moot even though the students' guardians ad litem entered into an agreement to remove them from school.[69] The court was of the view that if the students returned to school there was a reasonable expectation that they could once again be subjected to an effort by the district to enjoin them from attending classes. Similarly, the federal trial court in Vermont decreed that a suit dealing with the IDEA's least restrictive environment provision was not moot even though the parent reached an agreement with school officials regarding the student's IEP.[70] The court reflected that since the parent had indicated that she would seek mainstreaming again in the future, the litigation was capable of repetition.

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[64] Thompson v. Board of the Special Sch. Dist. No. 1, 144 F.3d 574 [126 Educ. L. Rep. 665] (8th Cir. 1998), *aff'g* 936 F. Supp. 644 [112 Educ. L. Rep. 888] (D. Minn. 1996).

[65] Independent Sch. Dist. No. 432 v. J.H., 8 F. Supp.2d 1166 [128 Educ. L. Rep. 659] (D. Minn. 1998).

[66] 20 U.S.C. § 1415(k)(7)(C).

[67] Gadsden City Bd. of Educ. v. B.P., 3 F. Supp.2d 1299 [127 Educ. L. Rep. 234] (N.D. Ala. 1998).

[68] Thomas R.W. by Pamela R. v. Massachusetts Dep't of Educ., 130 F.3d 477 [122 Educ. L. Rep. 597] (1st Cir. 1997).

[69] Gadsden City Bd. of Educ. v. B.P., 3 F. Supp.2d 1299 [127 Educ. L. Rep. 234] (N.D. Ala. 1998).

[70] St. Johnsbury Academy v. D.H., 20 F. Supp.2d 675 [130 Educ. L. Rep. 631] (D. Vt. 1998).

Several lawsuits dealt with jurisdictional issues. The federal trial court in Connecticut found that it had jurisdiction in a suit involving state agencies and a school district. The court posited that its powers extended to ordering noneducational agencies to provide a student with special education and related services if they are required to do so under state or federal law or an interagency agreement.[71] On the other hand, a district court in Illinois declined jurisdiction on the ground that a state agency was not required to share the costs of a free appropriate public education by either federal or state law or an interagency agreement.[72] Further, an appellate panel in New Jersey affirmed that it had jurisdiction in a suit for attorney fees because state and federal courts share concurrent jurisdiction over disputes involving the IDEA.[73]

Two courts refused to permit parents to introduce evidence into proceedings that was not included in the due process hearings. A federal trial court in Missouri simply wrote that the parents failed to present solid justification to expand the administrative record.[74] In Maryland, another federal court noted that while the parents asked to introduce additional evidence, they did not provide information about it or why it could not have been presented during the administrative proceedings.[75] The court concluded that the mere existence of more evidence in the abstract was insufficient to resist a properly supported motion for summary judgment.

The Supreme Court of Appeals of West Virginia reasoned that a suit was not precluded by a previous settlement agreement since that agreement made no mention of a restraining device which the parents were now claiming injured their child.[76] In the present action the parents sought damages even though the agreement was limited to issues surrounding the student's IEP.

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[71] J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [124 Educ. L. Rep. 853] (D. Conn. 1997).

[72] Board of Educ. of Community High Sch. Dist. No. 218, Cook County v. Illinois State Bd. of Educ., 979 F. Supp. 1203 [122 Educ. L. Rep. 632] (N.D. Ill. 1997).

[73] J.H.R. v. Board of Educ. of the Township of East Brunswick, 705 A.2d 766 [123 Educ. L. Rep. 1213] (N.J. Super. Ct. App. Div. 1998).

[74] Breen v. St. Charles R-IV Sch. Dist., 2 F. Supp.2d 1214 [127 Educ. L. Rep. 133] (1997).

[75] Jones v. Board of Educ. of Washington County, 15 F. Supp.2d 783 [129 Educ. L. Rep. 637] (D. Md. 1998).

[76] Ronnie Lee S. v. Mingo County Bd. of Educ., 500 S.E.2d 292 [126 Educ. L. Rep. 506] (W. Va. 1997).

Two federal appellate courts prevented non-attorney parents from proceeding *pro se* on behalf of their children in disputes initiated pursuant to the IDEA. Stating that children are entitled to trained legal assistance so their rights may be fully protected, the Second Circuit affirmed that a parent from New York who was not an attorney was unable to represent his son in federal court.[77] Similarly, the Third Circuit agreed that parents from New Jersey could not represent their child.[78] The court commented that Congress only intended to allow parents to represent students in administrative proceedings.

In a tuition reimbursement action, after a federal trial court in Arizona remanded a dispute to a hearing officer while terminating the action, the Ninth Circuit believed that the judge exceeded his authority by not staying the proceedings while the hearing officer made additional findings.[79] The court dismissed the case for lack of a final, appealable order.

Standing to Sue

A federal trial court in Illinois observed that a school district lacked standing to sue a state agency under the IDEA to require it to pay the residential costs of a placement.[80] The court pointed out that the agency was not required to share in the costs of providing an appropriate education.

According to a federal trial court in Tennessee, a protection and advocacy organization did not have standing to sue a school district.[81] The organization filed suit alleging that the district failed to meet its obligations to provide appropriate physical and occupational therapy to students with disabilities. However, the organization did not file it on behalf of specific children and failed to show an injury to itself. The court stated that the organization could establish standing by filing suit on behalf of specific individuals who themselves alleged that they suffered concrete harm due to the district's actions.

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[77] Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 [127 Educ. L. Rep. 66] (2d Cir. 1998).

[78] Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 [130 Educ. L. Rep. 1054] (3d Cir. 1998).

[79] Shapiro v. Paradise Valley Unified Sch. Dist., 152 F.3d 1159 [128 Educ. L. Rep. 988] (9th Cir. 1998).

[80] Board of Educ. of Community High Sch. Dist. No. 218, Cook County v. Illinois State Bd. of Educ., 979 F. Supp. 1203 [122 Educ. L. Rep. 632] (N.D. Ill. 1997).

[81] Tennessee Protection and Advocacy, Inc. v. Board of Educ. of Putnam County, Tenn., 24 F. Supp.2d 808 [130 Educ. L. Rep. 1240] (M.D. Tenn. 1998).

Statute of Limitations

The Sixth Circuit, applying Ohio's forty-five-day statute of limitations for appeals of administrative orders, affirmed that a cross-appeal filed seventy-eight days after the issuance of a hearing officer's report was untimely.[82] At the same time, a federal trial court in Ohio reflected that the statute of limitations in a suit seeking tuition reimbursement began to run when the parents removed their son from a public school.[83] The court was of the view that time began to run when the parents knew of their son's alleged injury and were aware of his right to request a due process hearing.

An appellate court in New Jersey, after being unable to rely on an analogous state statute of limitations in suits for attorney fees, affirmed that the adoption of a reasonable time rule was appropriate.[84] Here, where the suit was filed four months after the administrative review was issued, the court deemed that this time span was within reason. In addition, the federal trial court in New Jersey specifically wrote that the policies of the IDEA would be furthered by applying a longer statute of limitations to attorney fee actions than attached to a substantive review of an administrative action.[85] Even so, the court did not say how long the limitations period should be. Rather, the court acknowledged that under the circumstances, the parents' delay in filing a claim was not unreasonable.

In another suit involving attorney fees, a federal trial court in Indiana, following the Seventh Circuit's precedent, ascertained that such actions were analogous to administrative reviews of educational decisions.[86] Consequently, the court asserted that the state's thirty-day statute of limitations for administrative appeals applied. The court added that the limitations period began to accrue thirty days after the hearing officer's report was released because parties have thirty days to appeal such an order. Similarly, a district court in Arkansas decreed that instead of being an independent action, a claim for attorney fees was an ancillary claim to the plaintiffs' underlying educational dispute.[87] As such, the court determined that the state's thirty-day statute of limitations for judicial review of an adverse outcome by a state agency applied.

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[82] Cleveland Heights - University Heights City Sch. Dist. v. Boss, 144 F.3d 391 [126 Educ. L. Rep. 633] (6th Cir. 1988).

[83] James v. Upper Arlington City Sch. Dist., 987 F. Supp. 1017 [124 Educ. L. Rep. 113] (S.D. Ohio 1997).

[84] J.H.R. v. Board of Educ. of the Township of East Brunswick, 705 A.2d 766 [123 Educ. L. Rep. 1213] (N.J. Super. Ct. App. Div. 1998).

[85] B.K. v. Toms River Bd. of Educ., 998 F. Supp. 462 [126 Educ. L. Rep. 702] (D.N.J. 1998).

[86] Wagner v. Logansport Community Sch. Corp., 990 F. Supp. 1099 [124 Educ. L. Rep. 927] (N.D. Ind. 1997).

[87] Birmingham by Birmingham v. Omaha Sch. Dist., 17 F. Supp.2d 859 [129 Educ. L. Rep. 1085] (W.D. Ark. 1998).

On the other hand, a federal trial court in Kentucky contended that inasmuch as a suit for attorney fees was a separate claim and not part of the underlying administrative action, the state's thirty-day limitations period for review of an administrative order was inapplicable.[88] Rather, the court applied a five-year statute of limitations, declaring that it promoted participation of parents by giving them ample time to recover their litigation costs.

In Maryland, parents challenged an administrative law judge's award of one year of tuition reimbursement in place of the two they requested. The school district did not appeal the one-year award but filed a counterclaim to the parents' action. The federal trial court dismissed the district's counter claim on the basis that it was an appeal of an agency's order that was not filed in a timely manner.[89]

Actions Under Other Statutes

Parents who file claims pursuant to other federal statutes such as section 1983, section 504, or the ADA, are still required to exhaust administrative remedies under the IDEA, if relief is available under it, before bringing their suits to court. The Eleventh Circuit, in a succinct case from Florida, affirmed that claims asserted under section 504 and the ADA are subject to the IDEA's exhaustion requirement.[90] Similarly, a district court in Ohio decided that parents may not avoid the requirements of the IDEA's stay put provision by neglecting to submit a complaint for a due process hearing.[91]

In a suit alleging violations of section 1983 and state tort law, a district court in Michigan rejected the parents' claim that they were excused from the exhaustion requirement because they based their claim on a violation of constitutional rights, not the IDEA.[92] The court offered that since the parents' allegations of verbal and physical abuse were related to the manner in which the child was disciplined, their claim arose under the IDEA.

The federal district court in Maryland held that since parents' Rehabilitation Act claim was identical to their unsuccessful charge under the IDEA, the Section 504 allegation also failed.[93] Similarly, the district court in Minnesota held that parents cannot establish a viable claim under non-IDEA causes of action where the acts upon which those charges are based have withstood judicial review under the IDEA.[94] The court further indicated that no viable claim could exist under other statutes in the absence of a charge that is factually and legally distinct from one that had already been resolved under the IDEA.

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[88] King v. Floyd County Bd. of Educ., 5 F. Supp.2d 504 [127 Educ. L. Rep. 813] (E.D. Ky. 1998).

[89] Fritschle v. Andes, 25 F. Supp.2d 699 [131 Educ. L. Rep. 121] (D. Md. 1998).

[90] Babicz v. School Bd. of Broward County, 135 F.3d 1420 [123 Educ. L. Rep. 1133] (11th Cir. 1998). *See also* Tyson v. Kanawha County Bd. of Educ., 22 F. Supp.2d 535 [130 Educ. L. Rep. 779] (S.D. W.Va. 1997).

[91] James v. Upper Arlington City Sch. Dist., 987 F. Supp. 1017 [124 Educ. L. Rep. 113] (S.D. Ohio 1997).

[92] Franklin v. Frid, 7 F. Supp.2d 920 (W.D. Mich. 1998).

[93] Jones v. Board of Educ. of Washington County, 15 F. Supp.2d 783 [129 Educ. L. Rep. 637] (D. Md. 1998).

Whether compensatory damages are available under section 1983 for violations of the IDEA has recently become controversial. A district court in California found that damages are available under section 1983.[95] However, the Fourth Circuit reached the opposite result.[96] The latter court maintained that while section 1415 of the IDEA preserves remedies under the Constitution, section 504, and other federal statutes, it failed to mention section 1983. The Fourth Circuit went on to note that insofar as section 1983 is a general statute that mentions neither disability nor youth, it cannot be used to sue for an IDEA statutory violation. Further, the court expressed its opinion that permitting recovery of general damages under section 1983 for IDEA violations would subject school boards to damages exponentially greater than the tuition reimbursement they currently face under the IDEA.

A federal trial court in Minnesota mandated that parents who sought to have special education services provided on the premises of a parochial school were not entitled to attorney fees under section 1983.[97] The court posited that the school district's agreement to provide the requested services resulted not from the parents' suit but, rather, from the Supreme Court's decision in *Agostini v. Felton*.[98]

Placement

The IDEA regulations require school districts to insure that a continuum of alternative placements exists to meet the needs of students with disabilities for special education and related services.[99] The continuum must range from placement in general education to a private residential facility and also must include homebound services. The place-

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[94] Moubry v. Independent Sch. Dist. 696, Ely, Minn., 9 F. Supp.2d 1086 [128 Educ. L. Rep. 753] (D. Minn. 1998).

[95] Emma C. v. Eastin, 985 F. Supp. 940 [123 Educ. L. Rep. 717] (N.D. Cal. 1997).

[96] Sellers v. School Bd. of the City of Manassas, Va., 141 F.3d 524 [125 Educ. L. Rep. 1078] (4th Cir. 1998).

[97] Peter v. Wedl, 18 F. Supp.2d 1002 [130 Educ. L. Rep. 196] (D. Minn. 1998).

[98] 117 S. Ct. 1997 [119 Educ. L. Rep. 29] (1997).

[99] 34 C.F.R. § 300.551.

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ment chosen for any given student must be in the least restrictive environment (LRE) for that child and removal from general education can occur only to the extent necessary to provide special education and related services.[100] All placements must be made at public expense and must meet state educational standards.[101] Each placement must be reviewed at least annually and revised if necessary.[102] The Supreme Court explained that an appropriate education is one that is developed in compliance with the IDEA's procedures and is reasonably calculated to enable a child to receive educational benefits.[103] Although states must adopt policies and procedures that are consistent with the IDEA, they may provide greater benefits than those required by the federal law. If a state does establish higher standards, courts will consider them when evaluating an IEP's appropriateness.[104]

Appropriate Educational Placement

Two cases indicate that students may receive an appropriate education from programs other than special education as long as those placements meet their unique needs. The federal trial court in Massachusetts was of the opinion that a program does not need to be designated formally as special education in order to constitute a proper placement for a student with special needs.[105] Accordingly, the court stated that a sectarian school with a low student to teacher ratio, a structured and supportive environment, and appropriate peers met the educational needs of a student diagnosed with a personality disorder, even though it did not explicitly offer special education services. In Minnesota, the federal trial court pointed out that a student was not denied an appropriate education while he was placed in a Title I reading program because he made progress in reading while in that placement.[106]

The Sixth Circuit affirmed that parents in Kentucky were not entitled to dictate educational methodology or compel a school district to supply a specific program where the parties agreed on an IEP but disagreed on the exact placement.[107] Similarly, the Eighth Circuit reasoned that as long as a student is benefitting from her education, it is up to the educators to agree on the appropriate methodology.[108] The dispute centered on the parents' request that their daughter receive one-to-one instruction using the Orton-Gillingham method.[109]

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[100] 20 U.S.C. § 1412(a)(5).

[101] 20 U.S.C. § 1401(8).

[102] 20 U.S.C. § 1414(d)(4).

[103] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[104] *See e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 [28 Educ. L. Rep. 70] (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 [27 Educ. L. Rep. 1093] (3d Cir. 1985).

[105] Matthew J. v. Massachusetts Dep't of Educ., 989 F. Supp. 380 [124 Educ. L. Rep. 552] (D. Mass. 1998).

[106] Moubry v. Independent Sch. Dist. 696, Ely, Minn., 9 F. Supp.2d 1086 [128 Educ. L. Rep. 753] (D. Minn. 1998).

Two cases from the Tenth Circuit affirmed that Kansas has not set a higher standard for an appropriate education than required by the IDEA.[110] The court was of the view that language in the state law was comparable to that in *Rowley* and certainly did not indicate that the legislature intended to obligate school districts to maximize the educational opportunities provided to exceptional children.

Massachusetts does, however, have a higher standard than that established by the IDEA. The federal trial court in Massachusetts observed that a school district met the higher standard when it provided a student who was diagnosed with atypical pervasive developmental disorder with an educational program that allowed him to rank twenty-eight in a class of 208 at the end of eleventh grade.[111] The court was satisfied that the district's IEP was reasonably calculated to assure the student's maximum possible development in the least restrictive setting. Further, the court wrote that the parents' expectation that the district would mold the student into a responsible and independent individual capable of interacting with the material and social world around him was unreasonable in light of his disabilities.

The Second Circuit, in a case from New York, ruled that the IDEA does not require a program to maximize the potential of a disabled child.[112] As such, the court reflected that a proposed IEP that was similar to one under which the child had made progress was appropriate. Similarly, the First Circuit affirmed that a public school program in which a student made encouraging progress was appropriate.[113]

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[107] Tucker v. Calloway County Bd. of Educ., 136 F.3d 495 [124 Educ. L. Rep. 73] (6th Cir. 1998). *See also* Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 153 F.3d 727 [129 Educ. L. Rep. 37] (10th Cir. 1998) (mem.).

[108] E.S. v. Independent Sch. Dist., No. 196, 135 F.3d 566 [123 Educ. L. Rep. 1083] (8th Cir. 1998).

[109] *See also* Moubry v. Independent Sch. Dist. 696, Ely, Minn., 9 F. Supp.2d 1086 [128 Educ. L. Rep. 753] (D. Minn. 1998).

[110] O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 [126 Educ. L. Rep. 673] (10th Cir. 1998); Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 153 F.3d 727 [129 Educ. L. Rep. 37] (10th Cir. 1998) (mem.).

[111] Frank S. v. School Comm. of the Dennis-Yarmouth Reg. Sch. Dist., 26 F. Supp.2d 219 [131 Educ. L. Rep. 152] (D. Mass. 1998).

[112] Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 [126 Educ. L. Rep. 54] (2d Cir. 1998).

[113] Kathleen H. v. Massachusetts Dep't of Educ., 154 F.3d 8 [129 Educ. L. Rep. 38] (1st Cir. 1998).

In a case from Maryland, the federal trial court acknowledged that a proposed placement, which was similar to previous settings, was appropriate since the student received academic and nonacademic benefits from the IEPs that preceded the one in question.[114] In like fashion, the federal trial court in New Jersey asserted that a school district demonstrated that the program it offered to a mentally retarded student in her current placement was legally appropriate as it was calculated to confer some meaningful educational benefit on the child.[115]

A federal district court in Ohio believed that a student's standardized test scores, that showed that he was performing on a higher level than on previous measures, combined with his report card grades, showed that he received educational benefit from his IEP.[116] On the other hand, a trial court in Illinois ascertained that a student who failed half of her courses and received poor grades in most others did not receive an appropriate education.[117] Holding that *Rowley* requires more than *de minimis* benefit, the court commented that these grades indicated that the educational benefits the student received was minimal. The court added that the district failed to address the student's unique needs in its inadequate response to her behavioral problems.

According to the federal trial court in Connecticut, a student with a learning disability who did not make academic progress in a residential placement had not received an appropriate education.[118] The court determined that the student should have received psychological and counseling services along with instruction in community and daily living skills. Similarly, a state court in Pennsylvania affirmed an administrative order that an IEP that failed to address a student's social and emotional needs along with his academic needs was not calculated to benefit him educationally.[119]

The federal district court in Puerto Rico declared that the worsening of a student's behavior while he was enrolled in a public school program was insufficient, by itself, to establish that he had not received an appropriate education.[120] The court contended that a number of factors could have caused the student's behavior to worsen. Even so, the court concluded that the Department of Education's failure to provide a timely due process hearing was a procedural violation that was sufficient to permit it to proceed with a claim alleging that the Department failed to provide a free appropriate public education.

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[114] King v. Board of Educ. of Allegany County, Md., 999 F. Supp. 750 [126 Educ. L. Rep. 815] (D. Md. 1998).

[115] D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457 [123 Educ. L. Rep. 622] (D.N.J. 1997).

[116] Board of Educ. of Avon Lake City Sch. Dist. v. Patrick M., 9 F. Supp. 2d 811 [128 Educ. L. Rep. 728] (N.D. Ohio 1998).

[117] Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F. Supp.2d 862 [130 Educ. L. Rep. 726] (N.D. Ill. 1998).

[118] J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [124 Educ. L. Rep. 853] (D. Conn. 1997).

[119] Stroudsburg Area Sch. Dist. v. Jared M., 712 A.2d 807 [127 Educ. L. Rep. 359] (Pa. Commw. Ct. 1998).

[120] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

Least Restrictive Environment

A federal trial court in Vermont decided that a requirement by a school that students demonstrate a fifth grade achievement level before being mainstreamed violated the IDEA's least restrictive environment mandate.[121] The court found that the student at issue could have been successfully educated in the regular classroom since he had been successfully mainstreamed in the past. At the same time, an appellate court in Pennsylvania affirmed that a district failed to take reasonable steps to mainstream a seriously emotionally disturbed student because it failed to comply with state law by incorporating an individualized behavior management program in his IEP.[122]

The Second Circuit decreed that a school district would have violated the IDEA's least restrictive environment provision if it ordered the movement of a child from a day program where she was making progress to a residential program simply because the latter offered superior opportunities.[123] Similarly, the First Circuit,[124] in a case from Massachusetts and a federal trial court in Maryland,[125] supported public school placements over private school programs, in part, because they were less restrictive. Further, a federal trial court in Ohio supported a district's practice of mainstreaming students with behavioral disabilities as an appropriate, if not essential, element for fostering academic and social development.[126]

In a class action suit filed on behalf of all children enrolled in the Chicago Public Schools, a federal district court in Illinois judged that the state failed to monitor and enforce compliance with the IDEA's least restrictive environment mandate.[127] Among other things, the court indicated that the city's training programs for teachers were inadequate.

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[121] St. Johnsbury Academy v. D.H., 20 F. Supp.2d 675 [130 Educ. L. Rep. 631] (D. Vt. 1998).

[122] Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572 [124 Educ. L. Rep. 957](Pa. Commw. Ct. 1998).

[123] Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 [126 Educ. L. Rep. 54] (2d Cir. 1998).

[124] Kathleen H. v. Massachusetts Dep't of Educ., 154 F.3d 8 [129 Educ. L. Rep. 38] (1st Cir. 1998).

[125] King v. Board of Educ. of Allegany County, Md., 999 F. Supp. 750 [126 Educ. L. Rep. 815] (D. Md. 1998).

[126] Board of Educ. of Avon Lake City Sch. Dist. v. Patrick M., 9 F. Supp.2d 811 [128 Educ. L. Rep. 728] (N.D. Ohio 1998).

[127] Corey H. v. Board of Educ. of the City of Chicago, 995 F. Supp. 900 [125 Educ. L. Rep. 1129] (N.D. Ill. 1998).

Private Facilities

Where a district demonstrated that a mentally retarded student's current placement in a public school program was appropriate, the federal trial court in New Jersey maintained that a residential placement was not necessary.[128] The court noted that while parental desires for enhanced social contacts and relief for the primary care giver were reasonable and understandable concerns, they did not provide support for a residential placement in the absence of a showing that it was educationally necessary.

A federal trial court in Illinois offered that a twenty-four-hour residential placement that was made because of a student's uncontrolled out-of-school behavior, substance abuse, runaway behavior, defiance of home rules, and involvement with a negative peer group was not the financial responsibility of her school district.[129] Yet, insofar as the district failed to provide the student with an appropriate placement and she made progress at the residential facility, the court directed the district to pay for the educational component of her placement.

The Second Circuit reasoned that a student with a disability from New York was not entitled to a residential placement merely because it would have more nearly enabled her to reach her full potential.[130] The court posited that although parents may wish for a placement to maximize their child's potential, the IDEA does not require a district to provide such a program.

A federal district court in Ohio was of the opinion that a residential program was not required for a student who had learning disabilities and a severe behavior disorder.[131] The court pointed out that the district's severe behavior disability program met the student's needs and that the residential school's programs were not totally beneficial.

Related Services

The IDEA requires school districts to provide related, or supportive, services to students with disabilities if they are needed to assist the pupils in benefitting from their special education programs.[132] The Act specifically mentions transportation and such developmental, supportive, and corrective services as speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, counseling services (including rehabilitation counseling), orientation and mobility services, medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[133] The Supreme Court has ruled that related services need be provided only to students receiving special education and only those services that are necessary for the children to benefit from special education must be incorporated into the IEP.[134] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes.

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[128] D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457 [123 Educ. L. Rep. 622] (D.N.J. 1997).

[129] Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F. Supp.2d 862 [130 Educ. L. Rep. 726] (N.D. Ill. 1998).

[130] Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 [126 Educ. L. Rep. 54] (2d Cir. 1998).

[131] Board of Educ. of Avon Lake City Sch. Dist. v. Patrick M., 9 F. Supp.2d 811 [128 Educ. L. Rep. 728] (N.D. Ohio 1998).

[132] 20 U.S.C. § 1401(a)(22).

The federal trial court in South Dakota stated that students are not entitled to door-to-door transportation unless they are unable to travel to school without it.[135] The court agreed with the school district that if door-to-door transportation was not warranted by the child's disability, regular transportation would suffice.

One of the more controversial issues in recent years concerns whether school districts are required to provide, and pay for, full-time nursing services. The question may be settled shortly as the Supreme Court agreed to hear an appeal of a case from the Eighth Circuit that ordered a school district in Iowa to pay for such costs.[136] At the same time, the Seventh Circuit was satisfied that since a full-time nurse was a school health service, not a medical service, a district would not have been unduly burdened by having to provide such assistance.[137]

The federal district court in Connecticut wrote that a seriously emotionally disturbed student required a psychiatric evaluation to determine the extent to which he needed psychological and counseling services in order to benefit from his special education.[138] The court was of the opinion that the student had not made academic progress without the psychological and counseling services.

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[133] *Id.*

[134] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 [18 Educ. L. Rep. 138] (1984).

[135] Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772 [124 Educ. L. Rep. 101] (D.S.D. 1997).

[136] Cedar Rapids Community Sch. Dist. v. Garret F., 106 F.3d 822 [116 Educ. L. Rep. 78] (8th Cir. 1997), *cert. granted* ___ U.S. ___, 118 S. Ct. 1793 [125 Educ. L. Rep. 611] (1998).

[137] Morton Community Unit Sch. Dist. No. 709 v. J.M., 152 F.3d 583 [128 Educ. L. Rep. 972] (7th Cir. 1998), *aff'g* 986 F. Supp. 1112 [123 Educ. L. Rep. 1190] (C.D. Ill. 1997).

[138] J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [124 Educ. L. Rep. 853] (D. Conn. 1997).

Discipline

When first enacted, none of the IDEA's provisions specifically referred to discipline even though disciplinary sanctions as applied to students with disabilities were frequently the source of litigation. In the past, courts interpreted the IDEA's change in placement and status quo provisions as being applicable to the disciplinary process. In *Honig v. Doe*,[139] the Supreme Court asserted that special education students cannot be expelled for disciplinary reasons where their misconduct is a manifestation of the disability.

The 1997 IDEA Amendments include the first specific references dealing with discipline as applied to children with disabilities.[140] These provisions codified some of the prior case law and helped to clarify some grey areas. One of the new provisions allows administrators to transfer students to an interim alternative setting for up to forty-five days for possession of weapons or drugs.[141] The 1997 Amendments also made it clear that educational services must continue during an expulsion period.[142]

The Supreme Court and the current language of the IDEA do not leave school districts without recourse. Special education students may be temporarily suspended and are subject to other normal disciplinary sanctions. If necessary, school officials may bring a dispute to a hearing officer or seek judicial intervention pending completion of administrative due process hearings where they can show that a student is dangerous and they cannot reach an agreement with the student's parents concerning a proper placement. Further, *Honig* and the IDEA allow districts to use normal disciplinary sanctions for special education students, such as suspensions of ten days or less, that do not result in a change in placement.

A federal trial court in Alabama ascertained that although the 1997 IDEA Amendments give school districts the option of requesting an expedited hearing if they maintain that it is dangerous to keep a student in the current placement, the changes do not preclude them from going to court to seek a *Honig* injunction.[143] The court believed that the permissive term "may" in the amended statute meant that resort to such a hearing was optional.

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[139] 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).

[140] 20 U.S.C. § 1415(k).

[141] 20 U.S.C. § 1415(k)(1).

[142] 20 U.S.C. § 1412(a)(1)(A).

[143] Gadsden City Bd. of Educ. v. B.P., 3 F. Supp.2d 1299 [127 Educ. L. Rep. 234] (N.D. Ala. 1998).

Remedies

If a school district fails to provide an appropriate placement for a student with disabilities, courts are empowered to grant such relief as they deem appropriate.[144] The relief frequently involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. The Supreme Court has decreed that districts may be required to reimburse parents for costs incurred in providing their child with special education and related services if they prevail in having their chosen placement deemed appropriate.[145] In an amendment to the IDEA, those cases have been codified. Even so, reimbursement may be limited if the parents did not provide a district with prior notice of their dissatisfaction with the placement and their intent to enroll their child in a private school.[146] Reimbursement is allowed even if the parents' chosen facility is not state approved as long as it delivers an otherwise appropriate education.[147] Awards of compensatory education services have been made where parents lacked the financial means to obtain private services while litigation was pending.

In 1986, Congress passed the Handicapped Children's Protection Act, an amendment to the IDEA's predecessor, to allow parents who prevail in a suit pursuant to the IDEA to recover their legal expenses.[148] A 1997 amendment to the IDEA prohibits an award of attorney fees for representation at an IEP meeting unless the session was convened as a result of an administrative hearing.[149] In 1990, Congress passed legislation specifically abrogating the states' eleventh amendment immunity to suits in the federal courts for actions that occurred after October 30, 1990.[150] These amendments were passed in response to Supreme Court cases that the original Act neither allowed for recovery of attorney fees by prevailing parents[151] nor specifically abrogated the states' sovereign immunity.[152]

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[144] 20 U.S.C. § 1415(i)(2)(A).

[145] Burlington Sch. Comm. v. Department of Educ., Commonwealth of Mass., 471 U.S. 359 [23 Educ. L. Rep. 1189] (1985).

[146] 20 U.S.C. § 1412(a)(10)(C)(ii).

[147] Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 [86 Educ. L. Rep. 41] (1993).

[148] 20 U.S.C. § 1415(i)(3)(B) et seq.

[149] 20 U.S.C. § 1415(i)(3)(D)(ii).

[150] 20 U.S.C. § 1403.

[151] Smith v. Robinson, 468 U.S. 992 [18 Educ. L. Rep. 148] (1984).

[152] Dellmuth v. Muth, 491 U.S. 223 [53 Educ. L. Rep. 792] (1989).

Damages

A federal district court in California, relying on persuasive precedent from the Third Circuit, contended that compensatory damages are available under the IDEA.[153] The court commented that the IDEA and its legislative history are silent as to whether Congress meant to include such damages as an available remedy. Thus, the court agreed with the Third Circuit's rationale that damages were not precluded under the IDEA. However, the Fourth Circuit, in decreeing that tort-like damages are inconsistent with the IDEA's statutory scheme, concluded that awards of compensatory and punitive damages are not available under the Act.[154] The plaintiffs had sought damages claiming that the school system improperly diagnosed the student who consequently suffered tort-like injuries.

Tuition Reimbursement

Several courts found that parents who are dissatisfied with the educational programs of their children must give school districts the opportunity to address their concerns before unilaterally placing the students in private facilities. The Sixth Circuit[155] and Eighth Circuit[156] each ruled that parents were not entitled to reimbursement when they made unilateral placements in private facilities before giving the respective districts the opportunity to formulate new IEPs. In the Eighth Circuit, the court declared that since the district was denied the opportunity to formulate a plan to meet the student's needs, it could not be shown that he had an inadequate plan under the IDEA. Here the parents removed their son from the public schools and enrolled him in a private facility after only one day of classes.

A federal district court in Illinois denied a mother's request for tuition reimbursement in holding that she deprived the school district of the opportunity to evaluate her son and make a placement recommendation when she unilaterally enrolled him in an out-of-state residential facility.[157] Similarly, in Ohio, a federal trial court denied reimbursement in indicating that parents failed to take appropriate action to express their dissatisfaction with the district's programs or to inform officials that they were withdrawing their child from the public schools.[158]

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[153] Emma C. v. Eastin, 985 F. Supp. 940 [123 Educ. L. Rep. 717] (N.D. Cal. 1997), citing W.B. v. Matula, 67 F.3d 484 [104 Educ. L. Rep. 28] (3d Cir. 1995).

[154] Sellers v. School Bd. of the City of Manassas, Va., 141 F.3d 524 [125 Educ. L. Rep. 1078], *aff'g* 960 F. Supp. 1006 [118 Educ. L. Rep. 215] (E.D. Va. 1997).

[155] Tucker v. Calloway County Bd. of Educ., 136 F.3d 495 [124 Educ. L. Rep. 73] (6th Cir. 1988).

[156] Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 [124 Educ. L. Rep. 808] (8th Cir. 1998).

[157] Patricia P. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200, 8 F. Supp.2d 801 [128 Educ. L. Rep. 249] (N.D. Ill. 1998).

[158] Board of Educ. of Avon Lake City Sch. Dist. v. Patrick M., 9 F. Supp.2d 811 [128 Educ. L. Rep. 728] (N.D. Ohio 1998).

A mother in Maryland, who unilaterally enrolled her sixth grade son in a private school and requested a due process hearing, challenged a hearing officer's determination that the district provided an appropriate education. In the mother's suit asking for tuition reimbursement for the seventh grade, the federal trial court judged that regardless of whether the student received an appropriate education in the sixth grade, he was not entitled to attend a private school at public expense the following year without a showing that the district could not, or would not, provide an appropriate education for seventh grade.[159]

On the other hand, the federal district court in Puerto Rico granted partial tuition reimbursement to parents who withdrew their son from the public schools and later requested a due process hearing after finding that the department of education failed to provide a timely hearing.[160] The court granted reimbursement only for the time following the date on which the results of the hearing should have been rendered.

The federal district court in Massachusetts awarded tuition reimbursement to parents who enrolled their son in a sectarian school that did not offer special education services.[161] The court explained that the sectarian school offered an appropriate placement that was necessary due to the district's disregard for its responsibilities under the IDEA. Similarly, the Sixth Circuit affirmed a reimbursement order even though the private school in question did not satisfy the IDEA's mainstreaming requirement when it maintained that the district's IEP was inadequate.[162]

The Second Circuit affirmed an award of tuition reimbursement in observing that the parents had no alternative but to enroll their daughter in a private facility.[163] Here the school district noted that since the student, who had behavior problems, was not entitled to special education, it would develop a section 504 accommodation plan. However, the trial court directed the district to provide the student with an IEP. The appellate court agreed, mandating not only that the district should have developed an IEP to meet the student's needs but also that the section 504 plan was clearly inadequate.

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[159] Yancey v. New Baltimore City Bd. of Sch. Comm'rs, 24 F. Supp.2d 512 [130 Educ. L. Rep. 1224] (D. Md. 1998).

[160] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

[161] Matthew J. v. Massachusetts Dep't of Educ., 989 F. Supp. 380 [124 Educ. L. Rep. 552] (D. Mass. 1998).

[162] Cleveland Heights - University Heights City Sch. Dist. v. Boss, 144 F.3d 391 [126 Educ. L. Rep. 633] (6th Cir. 1998).

[163] Muller v. Committee on Special Educ. of the East Islip Union Free Sch. Dist., 145 F.3d 95 [127 Educ. L. Rep. 36] (2d Cir. 1998).

A district court in Illinois awarded tuition reimbursement for the educational portion of a residential placement, but not for room and board, in positing that a school system failed to deliver an appropriate placement for a student who did not require a twenty-four-hour residential placement for academic reasons.[164] The court added that even though the private school was not state-approved, it would not bar a reimbursement award.

Even though it ruled that a student did not require door-to-door transportation, the federal district court in South Dakota awarded reimbursement to her parents for providing it on their own.[165] When the student moved into the district, she had an IEP from her previous school calling for special transportation. Yet, the new district did not believe that such transportation was warranted. The court agreed that while special transportation was not needed, the new district was required to honor the student's previous IEP until such time as it could be reviewed. As such, the court ordered reimbursement for that time period. Conversely, the federal trial court in Minnesota denied reimbursement for transportation expenses when the parents failed to present any documented evidence of expenses.[166] The school district was initially of the view that the student was not entitled to special transportation but later agreed to provide it as a related service in the child's IEP. A hearing officer had awarded compensatory education services as a consequence of the district's initial failure to provide special transportation.

The Sixth Circuit remanded for further consideration a Tennessee trial court's decision denying tuition on the ground that the existence of a material issue of fact precluded summary judgment.[167] The court was concerned with whether the school district conducted sufficient child find activities. The court reasoned that if the district had not completed sufficient activities, then reimbursement may have been appropriate.

Compensatory Services

In Pennsylvania, an appellate court affirmed an award of one year of compensatory education by an administrative panel where the school district failed to comply with the IDEA's mainstreaming provisions.[168] The panel offered that the district failed to take reasonable steps to mainstream the student because the district had not complied with state law by incorporating an individualized behavior management program in the student's IEP.

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[164] Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F. Supp.2d 862 [130 Educ. L. Rep. 726] (N.D. Ill. 1998).

[165] Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772 [124 Educ. L. Rep. 101] (D.S.D. 1997).

[166] Moubry v. Independent Sch. Dist. 696, Ely, Minn., 9 F. Supp.2d 1086 [128 Educ. L. Rep. 753] (D. Minn. 1998).

[167] Doe v. Metropolitan Nashville Pub. Schs., 133 F.3d 384 [123 Educ. L. Rep. 37] (6th Cir. 1998).

[168] Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572 [124 Educ. L. Rep. 957] (Pa. Commw. Ct. 1998).

The federal trial court in New Jersey stated that a student was not entitled to compensatory educational services after her school corrected deficiencies in her IEP.[169] The court pointed out that school officials took corrective action as soon as they received the complaint about the student's IEP.

Attorney Fees

The federal trial court in New Jersey wrote that a mother who achieved the result she intended from her suit was the prevailing party entitled to attorney fees.[170] In addition, the court was satisfied that initiating the suit served as catalyst in causing the school district to alter its position regarding the student's placement. However, the woman's motion for attorney fees was denied without prejudice because she had not presented the court with sufficient information regarding hourly rates and the number of hours requested for reimbursement. Also in New Jersey, a state appellate court acknowledged that a parent who succeeded as a respondent rather than a party seeking relief was still a prevailing party entitled to attorney fees.[171] The court commented that state courts share jurisdiction over attorney fee actions.

A parent who prevailed on eight out of ten contested issues was entitled to attorney fees according to the federal trial court in Connecticut.[172] Moreover, the court asserted that the time spent by an attorney traveling to and from a hearing and time spent consulting with the parents before and after the hearing was compensable. Three other courts found that parents were the prevailing parties in their respective actions since they were successful on significant issues.[173]

The federal trial court in Puerto Rico decided that even if parents use an attorney from another geographic location, the fee award is to be based on rates for similar work in the locale where the action arose, regardless of the prevailing fees in the lawyer's own community.[174] Yet, the court agreed to adjust the attorney's hourly fee since special skill is required in complex special education cases. On the other hand, a federal trial court in Kentucky believed that a school district is not responsible for an inexperienced attorney's time and research expended to become familiar with special education statutes.[175] The court concluded that the attorney was not entitled to reimbursement for Westlaw charges or for post-relief monitoring. In a related issue, a district court in North Carolina declared that expert witness fees were not recoverable under the IDEA's attorney fees provision.[176]

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[169] D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457 [123 Educ. L. Rep. 622] (D.N.J. 1997).

[170] S.D. v. Manville Bd. of Educ., 989 F. Supp. 649 [124 Educ. L. Rep. 566] (D.N.J. 1998).

[171] J.H.R. v. Board of Educ. of the Township of East Brunswick, 705 A.2d766 [123 Educ. L. Rep. 1213] (N.J. Super. Ct. App. Div. 1998).

[172] C.G. by Mr. and Mrs. G. v. New Haven Bd. of Educ., 988 F. Supp. 60 [124 Educ. L. Rep. 156] (D. Conn. 1997).

[173] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997); D.H. by Mr. and Mrs. H. v. Ashford Bd. of Educ., 1 F. Supp.2d 154 [126 Educ. L. Rep. 932] (D. Conn. 1998); Y.O. by Ms. M. v. New Britain Bd. of Educ., 1 F. Supp.2d 133 [126 Educ. L. Rep. 917] (D. Conn. 1998).

Two courts granted partial awards. A district court in New York reduced the requested fee amount in ascertaining that some of the time entries recorded by the attorney were duplicative and excessive.[177] The court determined that in some instances two attorneys attended hearings even though only one of them needed to be present. Further, the court contended that some of the time entries were too vague for it to evaluate whether they were reasonable. In a case from Texas, the Fifth Circuit affirmed that parents who achieved limited success were not entitled to a full award of attorney fees.[178]

The courts continue to deny awards of attorney fees where parents were not the prevailing parties.[179] In a case from Minnesota, the Eighth Circuit found that a plaintiff who loses on the merits of a federal claim is not a prevailing party for purposes of an attorney fees award even if he or she prevails on a related state claim.[180] Similarly, in a case from New Hampshire, the First Circuit affirmed that a parent was not entitled to attorney fees even though the student's IEP was modified, since the trial court was satisfied that the IDEA had not been violated.[181] The court decreed that a party seeking fees under the catalyst theory must show that the relief ultimately obtained was sought and refused. In this case, the court indicated that the parent could not offer such proof.

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[174] Gonzalez v. Puerto Rico Dep't of Educ., 1 F. Supp.2d 111 [126 Educ. L. Rep. 910] (D.P.R. 1998).

[175] King v. Floyd County Bd. of Educ., 5 F. Supp.2d 504 [127 Educ. L. Rep. 813] (E.D. Ky. 1998).

[176] Eirschele v. Craven County Bd. of Educ., 7 F. Supp.2d 655 [128 Educ. L. Rep. 144] (E.D.N.C. 1998).

[177] Mr. X. v. New York State Educ. Dep't, 20 F. Supp.2d 561 [130 Educ. L. Rep. 626] (S.D.N.Y. 1998).

[178] Jason D. v. Houston Indep. Sch. Dist., 158 F.3d 205 [130 Educ. L. Rep. 29] (5th Cir. 1998).

[179] B.K. v. Toms River Bd. of Educ., 998 F. Supp. 462 [126 Educ. L. Rep. 702] (D.N.J. 1998); Independent Sch. Dist. No. 432 v. J.H., 8 F. Supp.2d 1166 [128 Educ. L. Rep. 659] (D. Minn. 1998).

[180] Warner v. Independent Sch. Dist. No. 625, 134 F.3d 1333 [123 Educ. L. Rep. 531] (8th Cir. 1998).

[181] State of New Hampshire v. Adams, 159 F.3d 680 [130 Educ. L. Rep. 472] (1st Cir. 1998).

The federal trial court in New Jersey denied an award of attorney fees where the only issue the parents prevailed on was a declaration that the IEP did not contain all of the required components.[182] The court held that a fee award would have been improper not only because the parent failed to make the IEP issue known to school officials before requesting a due process hearing but also due to the fact that they corrected the deficiencies immediately after receiving the complaint.

In a case from Massachusetts, the First Circuit affirmed that attorney fees were unwarranted where the changes made to a student's IEP were *de minimis* in the context of the parents' broader goals and there was no evidence that the school district would not have made the modifications in the absence of an administrative hearing.[183] A federal trial court in West Virginia denied attorney fees when it observed that changes to a student's IEP did not result from a judgment, consent decree, or settlement.[184] The school system had proposed an amended IEP immediately before a scheduled court hearing but after a due process proceeding and court ordered mediation.

The Fourth Circuit, in a case from Maryland, affirmed that an attorney-parent was not entitled to fees for representing his own child in an administrative hearing even though he was successful.[185] The court was of the opinion that insofar as a disabled student deserves independent legal services, the IDEA's attorney fees provision should be read to encourage parents to obtain independent counsel.

Other IDEA Issues

School districts are required to provide transition services to students with disabilities in order to assist them in moving from school to post-school activities.[186] In Connecticut, the federal trial court maintained that a student who had been diagnosed as having a conduct disorder, mixed specific developmental disorder, multiple personality disorder, and attention deficit disorder was entitled, under the IDEA, to transistion services including instruction in community and daily living skills.[187]

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[182] D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457 [123 Educ. L. Rep. 622] (D.N.J. 1997).

[183] Kathleen H. v. Massachusetts Dep't of Educ., 154 F.3d 8 [129 Educ. L. Rep. 38] (1st Cir. 1998).

[184] Nicholas v. Taylor County Bd. of Educ., 7 F. Supp.2d 789 [128 Educ. L. Rep. 151] (N.D. W.Va. 1998).

[185] Erickson v. Board of Educ. of Baltimore County, 162 F.3d 289 [131 Educ. L. Rep. 31] (4th Cir. 1998).

[186] 20 U.S.C. §§ 1401(30), 1414(d)(1)(A)(vii).

[187] J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [124 Educ. L. Rep. 353] (D. Conn. 1997).

The Fifth Circuit affirmed an order directing Louisiana to fund an interim residential placement while a final disposition was pending.[188] The court explained that under the IDEA, both the local school district and the state may be liable for failing to provide a free appropriate public education.

In Illinois, a federal trial court, in judging that the state failed to monitor and enforce compliance with the IDEA's least restrictive environment mandate, noted that the state is not required to micro manage local schools.[189] Rather, the court observed that the state is only required to correct a local district's systematic noncompliance with the IDEA. On the other hand, the federal trial court in Maryland posited that the state was not liable for a district's alleged failure to provide an appropriate placement for a child with autism where his parents failed to bring the issue to the state's attention until after they had instituted administrative proceedings.[190] The court added that the parents failed to show that the state should have been aware of the problem.

State Laws

Special education is governed by both state and federal law. While each state's special education statutes must be consistent with the IDEA, differences do exist. Most states have legislation that is similar to the IDEA, but several have requirements that go beyond its provisions. Some states have higher standards of what constitutes an appropriate education and/or stricter procedural requirements. In other instances, state laws establish procedures for implementing the special education program that are not explicitly covered by federal law. As can be expected, federal and state courts often are called on to interpret those provisions.

Kansas

The mother of a special education student who had been incarcerated sought a residential placement from his former school district following his release. However, during the student's confinement, the mother moved out of the district. The federal trial court in Kansas offered that the student was not entitled to receive educational services from his former district since he was neither living in it nor residing in it with a parent or a person who was acting in that capacity.[191]

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[188] St. Tammany Parish Sch. Bd. v. State of Louisiana, 142 F.3d 776 [126 Educ. L. Rep. 76] (5th Cir. 1998).

[189] Corey H. v. Board of Educ. of the City of Chicago, 995 F. Supp. 900 [125 Educ. L. Rep. 1129] (N.D. Ill. 1998).

[190] Gordon v. Board of Educ. of Howard County, 22 F. Supp.2d 499 [130 Educ. L. Rep. 775] (D. Md. 1998).

[191] Joshua W. v. Board of Educ. of Wichita Pub. Sch. U.S.D. No. 259, 13 F. Supp.2d 1199 [129 Educ. L. Rep. 335] (D. Kan. 1998).

Missouri

An appellate panel vacated a trial court's order for the parties to a settlement agreement to comply with it in reasoning that school officials failed to exhaust administrative remedies under state law.[192] The court pointed out that a hearing had been postponed when it appeared that the parties were close to reaching an amicable agreement. After the officials signed a draft of the agreement but the parents did not, the officials sought a court order to compel the parents to comply with the agreement.

New Jersey

The Supreme Court of New Jersey invalidated an amendment to the state's special education law regarding assistive technology devices because the terminology in the new law did not make it clear that such devices and services are to be considered in developing an IEP.[193] The suit had been filed by an advocacy group that claimed the terminology in the state statute was invalid because it was narrower than the language in federal law.

New York

A federal trial court rendered another decision in a longstanding dispute over who should bear the costs of educating a disabled student who was boarded in a family home in New York, but whose parents lived in Massachusetts. The court stated that in order to obtain a declaration making Massachusetts responsible for reimbursing the child's school district for the cost of tuition, the parents had to join that state as a party to the suit.[194] Previously, the Second Circuit wrote that even though the child lived in New York, his legal residence was with his parents in Massachusetts.[195]

In another longstanding dispute, an appellate court in New York struck down the latest piece of legislation designed to allow a Satmar Hasidic sect to form its own school district.[196] The court ruled that the new statute lacked the neutrality toward religion called for by the establishment clause.

An appellate court affirmed the denial of a petition challenging how a maintenance reimbursement rate was determined.[197] The court asserted that the respondents both provided a rational explanation of how the rate was calculated and did not act arbitrarily or capriciously in setting it.

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[192] Neosho R-V Sch. Dist. v. McGee, 979 S.W.2d 537 [131 Educ. L. Rep. 313] (Mo. Ct. App. 1998).

[193] *In re* Adoption of Amendments to N.J.A.C., 702 A.2d 838 [122 Educ. L. Rep. 733] (N.J. 1997).

[194] Caitlin v. Sobol, 988 F. Supp. 85 [124 Educ. L. Rep. 166] (N.D.N.Y. 1997).

[195] Caitlin v. Sobol, 93 F.3d 1112 [111 Educ. L. Rep. 1114] (2d Cir. 1996).

[196] Grumet v. Pataki, 675 N.Y.S.2d 662 [128 Educ. L. Rep. 801] (App. Div. 1998).

[197] Maryhaven Center of Hope v. Wing, 674 N.Y.S.2d 395 [127 Educ. L. Rep. 952] (App. Div. 1998).

Discrimination Under The Rehabilitation Act, Section 504

As amended, section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance. . . ."[198] Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in providing services or employment. Moreover, section 504 applies to any agency that receives federal funds, not just the schools.

A person is considered to have a disability under section 504 if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[199] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[200] The Supreme Court has found that a person is otherwise qualified for purposes of section 504 if he or she is capable of meeting all of a program's requirements in spite of the disability.[201] If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for the individual's disabilities unless doing so would create an undue hardship.[202]

Students

Elementary and Secondary

Students with disabilities in elementary and secondary schools have rights under section 504 as well as the IDEA. Often students and their parents file suits with claims under both laws. Frequently, the claims advanced under one statute are identical or similar to those under the other. However, sometimes distinct claims are filed under section 504.

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[198] 29 U.S.C. § 794.

[199] 29 U.S.C. § 706(7)(B).

[200] 34 C.F.R. § 104.3(j)(2)(ii).

[201] School Bd. of Nassau County v. Arline, 480 U.S. 273 [37 Educ. L. Rep. 448] (1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[202] 34 C.F.R. § 104.12(a).

A federal trial court in Texas decided that a school system did not violate section 504 in a suit alleging that a student who suffered a traumatic brain injury was subjected to discrimination.[203] The parents alleged that their son's rights were violated under section 504 when, after making a conducting error, a band director commented that he must be brain damaged, the English teacher failed to assist the student, he was removed from some of his classes due to poor performance, was taken off of the basketball team, and his teachers were not properly trained to deal with his disability. The parents also claimed that their son was retaliated against because of their own whistle-blowing activities. The court ascertained that the parents failed to allege any facts necessary to recover damages under section 504 and that their claims of discrimination were based mainly on their perception that their son suffered retaliation.

A federal trial court in Missouri held that in order to show discrimination under section 504, parents must demonstrate more than the failure to provide a free appropriate public education, an incorrect evaluation, or a faulty accommodation plan.[204] Similarly, the Fourth Circuit, in a case from Virginia, affirmed that in order to prove discrimination in a school setting, something more than a mere failure to provide a free appropriate public education must be shown.[205] The court contended that either bad faith or gross misjudgment must be shown before a section 504 violation can be made in the context of the education of a student with a disability. Observing that the parents alleged nothing more than a failure to assess and diagnose the student's disability in a timely manner, the court affirmed the dismissal of their claims. Similarly, the federal district court in Connecticut dismissed a suit filed against a private school, declaring that the mother had neither alleged nor demonstrated that it discriminated against her son due to his disability.[206] After the mother requested a due process hearing challenging the adequacy of her son's educational program, the school changed his placement with her consent. Even so, the mother sued the private school that the student formerly attended.

Parents in New Jersey who alleged that a school district's accommodation plan was inadequate successfully obtained reimbursement for a private school placement.[207] An administrative law judge (ALJ) ordered reimbursement after determining that the district failed to provide the student with a free appropriate education as required by section 504. Subsequently, the federal trial court issued a preliminary injunction compelling the board to comply with the administrative order, believing that the ALJ's conclusions were supported by the evidence.

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[203] K.U. by Michael U. v. Alvin Indep. Sch. Dist., 991 F. Supp. 599 [124 Educ. L. Rep. 933] (S.D. Tex. 1998).

[204] Breen v. St. Charles R-IV Sch. Dist., 2 F. Supp.2d 1214 [127 Educ. L. Rep. 133] (E.D. Mo. 1997).

[205] Sellers v. School Bd. of the City of Manassas, Va., 141 F.3d 524 [125 Educ. L. Rep. 1078] (4th Cir. 1998).

[206] A.W. by Mrs. C. v. Marlborough Co., 25 F. Supp.2d 28 [130 Educ. L. Rep. 1262] (D. Conn. 1998).

The federal trial court in Vermont decreed that segregating a student from the regular classroom absent an individualized evaluation of the appropriateness of such a setting violated section 504.[208]

Where a school nurse in Missouri refused to administer medication that exceeded the recommended maximum dosage in the Physician's Desk Reference, the Eighth Circuit affirmed that she acted out of concerns about the student's health and potential liability rather than his disability.[209] According to the court, expecting the school to waive its policy regarding the administration of medications was not a reasonable accommodation because it would have imposed undue financial and administrative burdens on the district by requiring it to evaluate the safety of the dosage and the likelihood of harm and liability in each individual case.

The First Circuit vacated a district court's injunction ordering a private school to reinstate a student in Puerto Rico with attention deficit hyperactivity disorder and oppositional defiance disorder who exhibited repeated misconduct.[210] The panel indicated that the alterations in the school's normal requirements and standards imposed by the trial court's order went far beyond what is required as a reasonable accommodation. The panel added that it exceeds the authority of a trial court to direct a school to suspend its normal codes of conduct to tolerate disruptive and disrespectful behavior when doing so impairs the education of other students and significantly taxes its resources. Further, the court was of the opinion that it was questionable whether the student even qualified as disabled since there was practically no evidence that his distractibility and hyperactivity substantially impaired his basic learning abilities.

A student from Georgia collapsed and died one week after she fell on a staircase at her school. The deceased student's parents filed suit alleging that school officials failed to accommodate their daughter's disability by not allowing her additional time to pass between classes and failing to locate her locker closer to her classes. An appellate court maintained that the parents did not show how the student's disabilities, allergies, and headaches would have caused difficulty in walking or negotiating stairs, thereby requiring accommodations.[211]

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[207] Borough of Palmyra, Bd. of Educ. v. F.C., 2 F. Supp.2d 637 [127 Educ. L. Rep. 113] (D.N.J. 1998).

[208] St. Johnsbury Academy v. D.H., 20 F. Supp.2d 675 [130 Educ. L. Rep. 631] (D. Vt. 1998).

[209] Davis v. Francis Howell Sch. Dist., 138 F.3d 754 [124 Educ. L. Rep. 840] (8th Cir. 1998).

[210] Bercovitch v. Baldwin Sch., 133 F.3d 141 [123 Educ. L. Rep. 1067] (1st Cir. 1998).

Higher Education

A student who become disabled due to complications of pregnancy and received a failing grade because she did not complete the clinical requirements of her nursing program filed suit against her school claiming discrimination. The federal district court in Massachusetts dismissed the student's discrimination suit in noting that the university reasonably accommodated her disability and that any further modifications would have lowered its academic standards or substantially altered its academic requirements.[212]

In Wyoming, the federal district court reasoned a technical school's having accepted a paraplegic student following a thorough review and with knowledge of his disability was sufficient to support the inference that the student was otherwise qualified.[213] As such, the court was satisfied that the student, who withdrew from the school after suffering various injuries, was not required to exhaust administrative remedies before filing suit under section 504.

The Seventh Circuit affirmed that the Wisconsin Division of Vocational Rehabilitation's discontinuation of the college tuition assistance program a student received did not violate section 504.[214] The court judged that since the student would not have been eligible to receive benefits in the absence of his disability, he was not otherwise qualified.

In further action in the ongoing lawsuit between learning disabled students and Boston University[215] the federal district court in Massachusetts posited that the university's refusal to allow course substitutions for its foreign language requirement did not violate section 504.[216] The court reflected that the university considered other alternatives to studying a foreign language and that its professional judgment regarding academic requirements was rational.

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[211] Crisp County Sch. Dist. v. Pheil, 498 S.E.2d 134 [125 Educ. L. Rep. 980] (Ga. App. Ct. 1998).

[212] Darian v. University of Massachusetts, Boston, 980 F. Supp. 77 [122 Educ. L. Rep. 676] (D. Mass. 1997).

[213] Powers v. MJB Acquisition Corp., 993 F. Supp. 861 [125 Educ. L. Rep. 420] (D. Wyo. 1998).

[214] Mallett v. Wisconsin Div. of Vocational Rehabilitation, 130 F.3d 1245 [122 Educ. L. Rep. 611] (7th Cir. 1997).

[215] *See* Yearbook of Education Law 1998 at 174 for background information on this lawsuit.

[216] Guckenberger v. Boston Univ., 8 F. Supp.2d 82 [128 Educ. L. Rep. 172] (D. Mass. 1998).

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A federal trial court in Virginia wrote that compliance with a university's honor code is clearly an essential function of being a graduate student.[217] A graduate student unsuccessfully filed suit alleging section 504 violations after he was expelled for plagiarism and cheating.

The Sixth Circuit affirmed that a college in Ohio was not required to waive its academic requirements or lower its standards to accommodate a student in light of the fact that it had already provided accommodations such as individualized tutoring, preferential seating, permission to tape record lectures, extra time on tests, and the opportunity to take tests in a separate room.[218] The student, who had attention deficit hyperactivity disorder, was dismissed after failing several courses.

Other Section 504 Issues

The federal district court in Massachusetts awarded $1,247,519.50 in attorney fees and $52,311.23 in costs to student-plaintiffs who substantially succeeded in a class action suit against Boston University.[219] However, the court reduced the requested amount in finding that the hours billed were excessive since the plaintiffs' counsel overstaffed and overbilled the case. The court also determined that the attorneys were to be compensated at Boston rates rather than the requested higher fees from San Francisco since they failed to show that out-of-town attorneys were required due to a lack of competence in the local area.

The Fourth Circuit, in a case from Virginia, affirmed that in order to pursue a claim for damages under section 504, a plaintiff must show either bad faith or gross misjudgment.[220] A trial court had ruled that although monetary damages are an available remedy under section 504, in order to recover such damages, a plaintiff must show intentional discrimination, bad faith, or the intentional deprivation of special education services, and not just mere negligence.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA),[221] which was enacted in 1990, is designed to prohibit discrimination against persons with disabilities in a wide range of activities sponsored by private as well as public entities. The ADA's greatest impact is on the private sector; however, many of its provisions apply to public entities and are similar in scope to those of section 504. Consequently, suits filed under the ADA should interest consumers of education law. Generally, satisfying the dictates of section 504 will result in compliance with the ADA. However, several provisions of the ADA addressed loopholes in section 504 and codified judicial interpretations of the Rehabilitation Act. Many actions that arise in the public sector are now brought on the basis of the ADA and section 504. In most of these suits, the disposition for both laws is identical. Cases that were discussed in the section 504 part of this chapter that had identical results under the ADA are not repeated in this section.[222]

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[217] Childress v. Clement, 5 F. Supp.2d 384 [127 Educ. L. Rep. 804] (E.D. Va. 1998).

[218] Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432 [131 Educ. L. Rep. 48] (6th Cir. 1998).

[219] Guckenberger v. Boston Univ., 8 F. Supp.2d 91 [128 Educ. L. Rep. 181] (D. Mass. 1998).

[220] Sellers v. School Bd. of the City of Manassas, Va., 141 F.3d 524 [125 Educ. L. Rep. 1078] (4th Cir. 1998); *aff'g* 960 F. Supp. 1006 [118 Educ. L. Rep. 215] (E.D. Va. 1997).

[221] 42 U.S.C. § 12101 et seq.

Students

Elementary and Secondary

A fifth year high school senior from Oregon who was deemed ineligible to participate in sports pursuant to an eight semester rule successfully obtained a preliminary injunction allowing him to play.[223] The student claimed that he repeated the tenth grade due to his disability, attention deficit disorder, but was not issued a waiver from the eligibility rule. The federal trial court issued the injunction in commenting that a similarly situated pupil had been granted a waiver and that this student's participation in sports would not frustrate the association's policies.

Higher Education

A student in Missouri who had not met the criteria to be certified as a qualifier by the National Collegiate Athletic Association (NCAA) filed a suit alleging discrimination under the ADA. A federal trial court held that the student had not demonstrated the substantial likelihood of establishing that he had a disability.[224] The court seemed to be swayed by the fact that the student was not seriously evaluated for a disability until after it was evident that he could not meet the NCAA's standards. However, in a similar lawsuit from New Jersey where the NCAA had classified the student as a nonqualifier because several of his special education classes did not qualify as core courses, the federal trial court decreed that several questions of fact precluded summary judgment.[225] In particular, the court was not convinced that the eligibility requirements were essential or necessary for the maintenance of intercollegiate athletics. The court stated that it had not been shown that the standards could not be modified in such a way that the goals of the eligibility requirements could not be achieved without use of the current criteria.

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[222] Powers v. MJB Acquisition Corp., 993 F. Supp. 861 [125 Educ. L. Rep. 420] (D. Wyo. 1998); Davis v. Francis Howell Sch. Dist., 138 F.3d 754 [124 Educ. L. Rep. 840] (8th Cir. 1998); Bercovitch v. Baldwin Sch., 133 F.3d 141 [123 Educ. L. Rep. 1067] (1st Cir. 1998); Darian v. University of Mass., Boston, 980 F. Supp. 77 [122 Educ. L. Rep. 676] (D. Mass. 1997); Guckenberger v. Boston Univ., 8 F. Supp.2d 82 [128 Educ. L. Rep. 172] (D. Mass. 1998), 8 F. Supp.2d 91 [128 Educ. L. Rep. 181] (D. Mass. 1998); Childress v. Clement, 5 F. Supp.2d 384 [127 Educ. L. Rep. 804] (E.D. Va. 1998), Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432 [131 Educ. L. Rep. 48] (6th Cir. 1998).

[223] Bingham v. Oregon Sch. Activities Ass'n, 24 F. Supp.2d 1110 [130 Educ. L. Rep. 1251] (D. Or. 1998).

[224] Tatum v. National Collegiate Athletic Ass'n, 992 F. Supp. 114 [125 Educ. L. Rep. 134] (E.D. Mo. 1998).

Other ADA Issues

In a case from Florida, the Eleventh Circuit concluded that the ADA included a clear statement of intent to abrogate Eleventh Amendment immunity.[226] The decision was part of a consolidated action in which motions for dismissal based on Eleventh Amendment immunity were brought in three cases.

A federal trial court in California declared that a school district failed to satisfy the requirements of a consent decree when it submitted a self-evaluation that was completed before the settlement was reached.[227] The court explained that the consent decree contemplated the preparation of a self-evaluation after the date of settlement, not that the school district would recycle an old report.

Conclusion

In 1998, a number of suits began to surface regarding provisions of the 1997 IDEA Amendments. It is fair to say that these amendments have changed the statute's mandates, in part by clarifying previously unsettled case law. One affected area concerns a school district's obligation to provide special education and related services to students who voluntarily attend private schools. Although the Supreme Court has lifted the ban on delivering such services on the premises of a parochial school, it appears that the IDEA does not mandate on-site services. Further, even though the current version of the IDEA makes it clear that students attending private schools have the right to some level of participation in programs funded by federal law, limitations have been placed on the amount of money that must be spent on such pupils.

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[225] Bowers v. National Collegiate Athletic Ass'n, 9 F. Supp.2d 460 [128 Educ. L. Rep. 670] (D.N.J. 1998).

[226] Kimel v. State of Florida Bd. of Regents, 139 F.3d 1426 [125 Educ. L. Rep. 341] (11th Cir. 1998).

[227] Putnam v. Oakland Unified Sch. Dist., 980 F. Supp. 1094 [122 Educ. L. Rep. 726] (N.D. Cal. 1997).

The amended IDEA also places obligations on parents to notify a school district of any dissatisfaction they have with an IEP or educational program before unilaterally removing the child and enrolling him or her in a private school. Failure to give the district an opportunity to address the parents' complaints will limit their right to later seek reimbursement for the costs of a private school, even if it is eventually shown that the school system's program was inadequate.

Whether a school district is responsible for providing extensive nursing services to medically fragile students under the IDEA's related services mandate is currently up in the air. The Supreme Court has granted certiorari in a case dealing with this issue and, hopefully, will render a decision in 1999.

Another settled area of special education law that has recently become unsettled concerns whether school districts can be liable for damages if they fail to provide a free appropriate public education. In the past, courts asserted that punitive or compensatory damages were unavailable under the IDEA beyond an award of tuition reimbursement. However, courts are now sending out signals that damages may be available in such instances, possibly under other federal statutes protecting the rights of individuals with disabilities.

6

TORTS

William J. Evans, Jr.

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Introduction

Tort law provides remedies for individuals who have been injured by the unreasonable conduct of others. This chapter examines cases brought by or on behalf of students, school employees, and, in some instances, visitors on school grounds. Tort actions resulting from interscholastic sports are discussed in Chapter 7, Sports.

Negligence

Negligence is the most common tort committed by school personnel. A tort can arise when an improper act, or failure to act, causes injury to another. At the same time, an individual cannot be liable for a tort unless there is a causal relationship between the alleged conduct and the injury. When an injured party claims that a tort has occurred, the behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would, or should, have done in the same or similar circumstances.

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases are divided into categories according to where or how the injury was sustained and when sovereign or statutory immunity was not used as the defense.

Off School Property and After School Hours

A twelve-year-old student sustained burns when his friend started a fire in a school shed. The injured student's mother unsuccessfully sued the district for damages. On appeal, the Supreme Court of Maine affirmed that since the student appreciated the dangers involved, there could be no recovery under the theory of attractive nuisance.[1]

A pedestrian in an overflow parking lot off school grounds was injured when a student driver lost control of his car and struck him. The pedestrian sued the district for negligent supervision of the driver. The Supreme Court of California decided that neither the district nor any of its employees owed the pedestrian a duty.[2] The court was convinced that the district did not have a duty to control the conduct of the student or to warn those who might have been injured by his conduct.

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[1] Collomy v. School Admin. Dist. No. 55, 710 A.2d 893 [126 Educ. L. Rep. 1062] (Me. 1998).

[2] Hoff v. Vacaville Unified Sch. Dist., 968 P.2d 522 [131 Educ. L. Rep. 513] (Cal. 1998).

In the first of four cases from New York, a sixth grade student was raped after she was given permission to leave the park where a class field trip was taking place. The supervising teacher left the park without the student and without notifying the school or the police. However, he did stop by the student's house to tell her mother she was missing before returning to school. The student unsuccessfully sued the board for her injuries. On further review of the dismissal of the student's claim, the Court of Appeals of New York reversed in holding that the board was liable since evidence supported the jury's verdict that the rape was a foreseeable result of the danger created by the school's failure to supervise the outing.[3]

A student who was injured when he fell from a football blocking sled on school grounds after practice had ended sought further review of a grant of summary judgment in favor of the district. An appellate court in New York affirmed that the suit failed because the district did not breach any duty to supervise the student since the student returned to the school grounds after football practice.[4]

An adult member of a soccer league which played in a school gymnasium unsuccessfully sued a board of education for injuries he sustained when he was kicked by an allegedly inebriated opponent. An appellate court in New York affirmed that the board's regulations against consumption of liquor on school premises did not give it a duty to enforce the rule.[5]

In New York, parents sued a district after their son died as a result of injuries he sustained during the course of a spontaneous, pickup football game in a school yard. An appellate court affirmed a grant of summary judgment in favor of the board, explaining that it did not have the duty to supervise activity that took place prior to the start of the school day.[6]

Parents challenged an adverse grant of summary judgment in their negligence and wrongful death action against a school district and a teacher after their son was shot and killed by a fellow pupil off of school premises. An appellate court in Arizona affirmed that neither the district nor teacher breached a statutory duty or created an unreasonable risk to the deceased student by failing to discipline the pupil who eventually shot him to death.[7] The court declared that the act was so unforeseeable that it could not have imposed a duty on the district to discipline students for conduct away from school.

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[3] Bell v. Board of Educ. of the City of New York, 665 N.Y.S.2d 42 [122 Educ. L. Rep. 1031] (1997).

[4] Reed v. Pawling Cent. Sch. Dist., 664 N.Y.S.2d 483 [122 Educ. L. Rep 521] (App. Div. 1997).

[5] Krigos v. New York City Bd. of Educ., 668 N.Y.S.2d 675 [124 Educ. L. Rep. 361] (App. Div. 1998).

[6] Phillipe v. City of New York Bd. of Educ., 678 N.Y.S.2d662 [129 Educ. L. Rep. 1136] (App. Div. 1998).

[7] Hill v. Safford Unified Sch. Dist., 952 P.2d 754 [124 Educ. L. Rep. 721] (Ariz. Ct. App. 1997).

School Settings During School Hours

A student who suffered head injuries on a school playground and his parents sought further review of an adverse grant of summary judgment in their negligence action against the district. The Supreme Court of Iowa reversed and remanded for trial since the jury verdict, which refused to award any damages, was not adequately supported in fact and law.[8] At the same time, the court found that expert testimony by a board-certified neuropsychiatrist was admissible along with evidence regarding the student's five previous injuries as the latter showed causation of his ongoing difficulties.

Where a first grade student was injured while playing a game that his teacher had just taught his class, his parents prevailed in their suit for negligent supervision. On further review, the Supreme Court of Nebraska affirmed that the teacher failed to act as a reasonably prudent person in her position would have because she did not provide direct supervision, even in the early portions of a game which the children were playing for the first time.[9]

A district challenged a verdict in favor of a female student who was sexually assaulted by a classmate when she walked through a gym area where several males had been left alone by their teacher. An appellate court in South Carolina reversed in asserting that it was up to a jury to determine whether the school was grossly negligent because the supervising teacher left the building.[10] The court added that since the rape shield statute was inapplicable in this civil suit, evidence of the female's willing participation in the sexual activity was admissible.

In the first of five cases from New York, a district sought further review of the denial of its motion to dismiss a breach of supervision claim filed by a student who sustained an eye injury when she was hit by part of a combination lock that another pupil threw. An appellate court reversed in favor of the district on the basis that past anti-social behavior by the first student was too remote in time and insufficiently similar so as to put school personnel on notice that he posed a danger to others in the hallway.[11] Moreover, the court noted that the presence of a hall monitor was unlikely to have prevented the student's action.

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[8] Johnson v. Knowville Community Sch. Dist., 570 N.W.2d 633 [122 Educ. L. Rep. 778] (Iowa 1997).

[9] Johnson v. School Dist. of Millard, 573 N.W.2d 116 [123 Educ. L. Rep. 904] (Neb. 1998).

[10] Doe v. Orangeburg County Sch. Dist. No.2, 495 S.E.2d 230 [123 Educ. L. Rep. 368] (S.C. Ct. App. 1997).

[11] Malik v. Greater Johnstown Enlarged Sch., 669 N.Y.S.2d 729 [124 Educ. L. Rep. 1025] (App. Div. 1998).

A district challenged the denial of its motion for summary judgment in a negligent supervision suit filed on behalf of an eighth grade student who was sexually assaulted by two classmates. An appellate court in New York reversed because the incident was unforeseeable in light of the fact that the students had no prior history which would have put the district or a teacher on notice.[12]

Where a ninth grade student sued for injuries he incurred when he fell from a snow tube while riding down a hill during gym class, an appellate court in New York affirmed the denial of the district's motion for summary judgment.[13] The court believed that there were material issues of fact as to whether the student voluntarily agreed to slide down the hill and if school personnel breached their supervisory duty.

According to an appellate court in New York, the impulsive, unanticipated act of a student's hitting another during an argument over a cigarette could not be the basis for a negligence action against a school and principal.[14] The court observed that a disciplinary record involving smoking and verbal abuse could not be seen as an indicator that the student might have committed acts of physical violence.

A district sought further review of the denial of its motion for summary judgment in an action filed on behalf of a student who was injured when another child "came flying out of a classroom backwards" and knocked her to the ground. An appellate court reversed in favor of the district.[15] The court posited that it was unreasonable to expect schools to have continuous supervision and control all movements and activities of students.

In School Buildings and on School Grounds

The Supreme Court of Montana affirmed a grant of summary judgment in favor of a district that was sued by a mother who slipped and fell on a snow covered path between the parking lot and the school.[16] The court agreed that the district did not breach its duty to maintain its premises in a reasonably safe condition. The court pointed out that since the woman walked over the path to get into the school, it did not owe her a duty to warn her of an obvious danger.

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[12] Schrader v. Board of Educ., 671 N.Y.S.2d 785 [125 Educ. L. Rep. 789] (App. Div. 1998).

[13] Pike v. Gouverneur Cent. Sch. Dist., 671 N.Y.S.2d 872 [125 Educ. L. Rep. 805] (App Div. 1998).

[14] Kennedy v. Seaford Union Free Sch. Dist. No. 6, 672 N.Y.S.2d 407 [126 Educ. L. Rep. 407] (App. Div. 1998).

[15] Johnsen v. Cold Spring Harbor Cent. Sch. Dist., 674 N.Y.S.2d 740 [127 Educ. L. Rep. 964] (App. Div. 1998).

[16] Richardson v. Corvallis Pub. Sch. Dist. No.1, 950 P.2d 748 [123 Educ. L. Rep. 930] (Mont. 1997). *See also* Hilf v. Massapequa Union Free Sch. Dist., 664 N.Y.S.2d 624 [122 Educ. L. Rep. 762] (App. Div. 1997) (finding that a district was not liable for injuries sustained by student who slipped and fell on snow).

In new Mexico, a student challenged an adverse motion for summary judgment after he sued the district for injuries that he sustained when he fell through a window that had no safety glass or protective guards. Several years earlier, the school had remodelled this area and it became a heavy student traffic area. An appellate court reversed in favor of the student.[17] The court maintained that the district waived governmental immunity for an injury caused by negligence in the operation or maintenance of a building. The court was satisfied that the district could be liable for the negligence of its own employees for failure to deal with the design defect in the school building.

Conversely, in the first of four cases from New York, an appellate court affirmed that a school district could not be liable for injuries that an elementary student incurred when she fell against a window. [18] The court was of the view that although the expert witness who testified on behalf of the child's parents claimed that the district's failure to use impact-resistant glass in windows near play areas violated provisions in a state university manual of planning standards, there was no evidence that the standards reflected generally accepted architectural safety practices.

A student who was injured while playing football on a concrete schoolyard challenged a grant of summary judgment in favor of the city. An appellate court affirmed that the city was not liable since the student assumed the risks inherent in playing football on such a surface, including conditions associated with construction in the schoolyard and any open or obvious conditions therein.[19]

Where a sixteen-year-old was injured while playing in a recreational basketball game, the primary issue in his suit against the school district which owned the gymnasium was the gymnasium's possible dangerous condition. An appellate court in New York affirmed the denial of the district's motion for summary judgment.[20] The court cited issues of fact as to whether the dimensions of the court and lack of padding on the wall behind the basket created dangers above those inherent in the sport of basketball.

A student in New York sought further review of a grant of summary judgment in favor of a district after she sued it for negligent supervision when officials failed to stop her from playing on playground equipment because she was wearing an adult's bicycle glove. An appellate court affirmed that no expert testimony was needed to establish the degree or kind of supervision that the district required.[21]

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[17] Williams v. Central Consol. Sch. Dist., 952 P.2d 978 [124 Educ. L. Rep. 729] (N.M. Ct. App. 1997).

[18] Ambrosio v. South Huntington Union Free Sch. Dist., 671 N.Y.S.2d 110 [125 Educ. L. Rep. 770] (App. Div. 1098).

[19] Riquelme v. City of New York, 674 N.Y.S.2d 111 [127 Educ. L. Rep. 394] (App. Div. 1998).

[20] Greenburg v. Peekskill City Sch. Dist., 680 N.Y.S.2d 622 [131 Educ. L. Rep. 243] (App. Div. 1998).

In Illinois, a board challenged a ruling in favor of a volunteer construction worker who was injured after he fell from a scaffold while helping to construct a press box above school bleachers. An appellate court focused on the volunteer's age, experience, and familiarity with the task at hand in affirming that the board did not owe him a duty to prevent the man from using improper equipment.[22]

Negligence Defenses

School districts, administrators, and/or teachers involved in negligence actions have a number of defenses available ranging from common law sovereign immunity to more affirmative defenses. The motivation behind common law immunity is to limit the flow of public money to private citizens because such payments detract from the educational functions of the schools. Affirmative defenses bar recovery by parties whose behavior in some way caused their injuries.

Immunity

Common Law (Governmental Immunity)

Even though courts have generally been reluctant to disturb school district immunity, plaintiffs were successful in the first four of the nine reported cases. Where a student who was injured in a high school swimming class unsuccessfully sued his district for negligence, the Supreme Court of Michigan reversed in his favor and remanded for trial.[23] The court decreed that since the student's use of the pool for diving as part of his swimming class was not a misuse of the facility, the district's duty to construct, repair, and keep it in a safe condition for both swimming and diving rendered the student's allegations as to whether a building defect existed triable.

The Supreme Court of Connecticut was of the opinion that a school's lack of supervision in the hallway where an eight-year-old student was tripped by another child was sufficient to preclude its motion for immunity.[24] In remanding for trial, the court relied on the imminent harm exception to governmental immunity.

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[21] Eldridge v. Long Beach City Sch. Dist., 680 N.Y.S.2d 657 [131 Educ. L. Rep. 246] (App. Div. 1998).

[22] Boycher v. Livingston Parish Sch. Bd., 716 So. 2d 187 [128 Educ. L. Rep. 1340] (La. Ct. App. 1998).

[23] Sewell v. Southfield Pub. Schs., 576 N.W.2d 153 [125 Educ. L. Rep. 214] (Mich. 1998).

[24] Purzycki v. Town of Fairfield, 708 A.2d 937 [125 Educ. L. Rep. 684] (Conn. 1998).

In Pennsylvania, a woman who was injured when she slipped and fell while walking down a school corridor to attend a parent-teacher conference challenged a grant of summary judgment in favor of the district. An appellate court reversed in finding that due to the custodian's negligence there was water in the corridor where the woman slipped. Thus, the real property exception to governmental immunity did not apply.[25]

Parents of a high school student who was fatally stabbed sought further review of a grant of summary judgment in their suit against a city school district which alleged that their son's death was due to the negligent way in which its employees handled the violent student who committed the crime. An appellate court in Massachusetts reversed in favor of the parents since there were material issues of fact as to whether the employees' handling of the student was a discretionary function and whether the student's conduct resulting in the fatal injuries were originally caused by the district or its employees.[26]

Where a student was struck by an automobile after leaving his school bus as the driver signaled that it was safe to cross, his parents unsuccessfully sued the district. The Supreme Court of Pennsylvania reasoned that the motor vehicle exception to governmental immunity did not apply to the actions of the bus driver since the accident occurred as he attempted to supervise the student rather than in operating the bus.[27]

In Connecticut, a middle school student who was struck in the eye by a bean unsuccessfully claimed that her injury was caused by a teacher's failure to comply with a school policy requiring all staff to be present physically and visibly in hallways to supervise pupils as they changed classes. An appellate court affirmed that the student did not sufficiently allege facts to bring her claim under the identifiable person imminent harm exception to governmental immunity because the harm was caused by the voluntary, wilful act of another child and school officials did not have any knowledge that he possessed beans or would throw them at the plaintiff.[28]

A basketball player who was injured while playing on an outdoor court at an elementary school when he fell after stepping in a hole challenged a grant of summary judgment in favor of the district. An appellate court in New York affirmed that the player assumed the risk of injury when he chose to play on a court surface that had open and obviously faulty conditions.[29]

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[25] Hanna v. West Shore Sch. Dist., 717 A.2d. 626 [129 Educ. L. Rep. 441] (Pa. Commw. Ct. 1998).

[26] Allen v. City of Boston, 693 N.E.2d 699 [125 Educ. L. Rep. 203] (Mass. Ct. App. 1998).

[27] White v. School Dist. of Philadelphia, 718 A.2d 778 [129 Educ. L. Rep. 1115] (Pa. 1998).

[28] Bonamico v. City of Middletown, 706 A.2d 1386 [124 Educ. L. Rep. 944] (Conn. Ct. App. 1998).

[29] Paone v. County of Suffolk, 674 N.Y.S.2d 761 [127 Educ. L. Rep. 971] (App. Div. 1998).

In the first of two cases from Georgia, a student unsuccessfully sued his school district, assistant principal, and bus driver for injuries she sustained after being attacked with a knife by a fellow student. An appellate court affirmed that the defendants were entitled to official immunity.[30] The court indicated that since the actions of the assistant principal and bus driver in investigating the student's complaint that another child threatened her with a knife were discretionary rather than ministerial, they were entitled to immunity.

A mother sought further review of a grant of summary judgment in favor of a district in her negligence action for injuries that her daughter incurred when she fell from playground equipment while attending an after-school child care program on school premises. An appellate court affirmed that the doctrine of sovereign immunity applied.[31] The court disagreed with the mother's claim that the after-school program, for which she paid a fee, was not public education or a governmental activity insofar as it served an educational purpose.

Statutory Immunity

As witnessed by their having prevailed in all three reported cases involving it, plaintiffs had more success with the defense of statutory immunity. Where a student was sexually assaulted by an intruder in a school locker room, she filed suit alleging that administrators failed to provide adequate supervision, protection, security, or to enact appropriate security policies. The Supreme Court of Minnesota stated that since actions flowing from a governmental entity's failure to enact a policy is at the operational level, it is not entitled to statutory immunity.[32] The court remanded for a consideration of whether the school had a common-law duty to protect students and whether it specifically related to the conduct of the defendants.

A student was shot and killed in a school hallway by another student. The deceased student's estate challenged a grant of summary judgment in favor of the district in its wrongful death action. An appellate court in South Carolina reversed and remanded in favor of the estate.[33] The court contended that with only two poorly equipped and trained campus monitors to supervise almost 1,000 students in three halls on three floors, issues of fact precluded summary judgment on whether the district was grossly negligent. The court remarked that the district could not claim immunity under any subsection of the Torts Claim Act unless or until the issue of gross negligence was resolved.

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[30] Payne v. Twiggs County Sch. Dist., 501 S.E.2d 550 [127 Educ. L. Rep. 448] (Ga. Ct. App. 1998).

[31] Dollar v. Dalton Pub. Schs., 505 S.E.2d 789 [130 L. Rep. 330] (Ga. Ct. App. 1998).

[32] S.W. v. Spring Lake Park Sch. Dist. N. 16, 580 N.W.2d 19 [127 Educ.L. Rep. 422] (Minn. 1998).

[33] Etheredge v. Richland Sch. Dist. 1, 499 S.E.2d 238 [126 Educ. L. Rep. 490] (S.C. Ct. App. 1998).

A mother sought further review of the dismissal of her negligent supervision suit against a town, district, and various officials after her son was stabbed to death. Even though the principal saw three students openly brandishing knives as they entered the school, he neither confronted them nor obstructed their progress. An appellate court in Massachusetts reversed and remanded in favor of the mother.[34] The court judged that the town was not immune from liability since it failed to adopt or implement security procedures.

Other Defenses

Comparative Negligence

In the first of three cases from Louisiana, a teacher who fell and broke her arm after one of her students ran into her challenged a judgment which assessed her as 65% at fault. An appellate court reversed in favor of the teacher.[35] The court wrote that the teacher was not at fault in any way because she could not have anticipated the child's actions.

Where the mother and sister of a high school student who died of an asthma attack prevailed in their suit against school officials and others, the defendants, including an insurance company, sought further review. An appellate court in Louisiana modified the allocation of fault to place 50% of the blame on the student's counselor based on his requiring parental permission before calling 911 even though the student was in obvious and severe distress.[36] The court allocated 30% of the fault to the principal due to his failure to ensure that the student received prompt medical treatment and the remaining 20% against the board since the counselor misunderstood its policy.

As they were stepping off of a city bus, a male student broke the jaw of a female classmate with whom he had earlier altercations. The board and transit authority challenged a judgment in favor of the injured student's mother. An appellate court modified in ascertaining that the district was 10% at fault based on its poor documentation of the prior incidents and the fact that the female student had informed school officials of earlier threats. The court placed 20% of the blame on the transit authority because the driver ordered the students to leave the bus. The court concluded that the student who committed the assault was 60% at fault while the injured student was liable for 10% based on her behavior in the incident.[37]

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[34] Brum v. Town of Dartmouth, 690 N.E.2d 844 [123 Educ. L. Rep. 1260] (Mass. Ct. App. 1998).

[35] Nalle v. State Farm Fire & Casualty Co., 702 So. 2d 854 [122 Educ. L. Rep. 1082] (La. Ct. App. 1997).

[36] DeClouet v. Orleans Parish Sch. Bd., 715 So. 2d 69 [128 Educ. L. Rep. 541] (La. Ct. App. 1998).

[37] Wijngaarde v. Parents of Guy, 720 So. 2d 6 [130 Educ. L. Rep. 956] (La. Ct. App. 1998).

Notice of Claim

The requirement that an injured party file a timely notice of claim is designed to provide a defendant with the opportunity to investigate a complaint while the facts are still fresh. Plaintiffs successfully challenged notice requirements in the first two of this year's six reported cases. A high school student sued her district and individual administrators alleging they deprived her of her rights to equal protection and due process under the Fourteenth Amendment. A federal trial court in Arizona rejected the defendants' motion to dismiss based on an untimely filing in asserting that it was a question of fact for a jury to decide whether threats from an assistant principal put the student under such duress that she was entitled to extend the notice period. In addition, the court offered that there were disputed issues of material fact as to the time the student could have discovered her cause of action against the district.[38]

In California, a school district sought further review of a trial court's action in permitting a student to file a late notice of claim in a case involving sexual molestation. An appellate court affirmed that the suit was properly permitted to proceed since there was substantial evidence that the district's unconscionable acts had the effect of deterring the filing of the claim.[39]

Where a student sued his teacher and the school district for sexual abuse, a trial court granted the defendants' motions for summary judgment. Subsequently, an appellate court affirmed in favor of the district but reversed with regard to the teacher. On further review, the Supreme Court of Oregon reversed in holding that the appellate panel erred in reversing the earlier grant of summary judgment in favor of the teacher because the trial judge declined to exercise discretion in accepting materials that were filed after the due date.[40] The court also affirmed the grant of summary judgment in favor of the district.

A school custodian challenged the denial of his request for worker's compensation benefits due to her occupational asthma. The Supreme Court of Wyoming affirmed the denial based on the custodian's having failed to file her claim in a timely manner.[41] The court noted that the custodian's petition was properly denied because she had the duty to report her injury when her doctor informed her that her asthma was probably exacerbated by the cleaning chemicals with which she was working.

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[38] Jane Doe One v. Garcia, 5 F. Supp.2d. 767 [127 Educ. L. Rep. 838](D. Ariz. 1998).

[39] Ortega v. Pajaro Valley Unified Sch. Dist., 75 Cal. Rptr.2d 777 [125 Educ. L. Rep. 1300] (Cal. Ct. App. 1998) *See* W.J.L. v. Bugge, 573 N.W.2d 677 [123 Educ. L. Rep. 1282] (Minn. 1998) (denying a student's motion to serve late notice of claim for sexual abuse which allegedly occurred over twelve years earlier).

[40] Finney v. Bransom, 953 P.2d 377 [124 Educ. L. Rep. 1101] (Or. 1998).

[41] Zielinske v. Johnson County Sch. Dist. No. 1, 959 P.2d 706 [127 Educ. L. Rep. 1092] (Wyo. 1998).

In the first of two cases from New York, a teacher who was assaulted by a student with an emotional disability sought further review of the denial of her request to serve a late notice of claim. An appellate panel affirmed that the trial court did not abuse its discretion in the face of the teacher's allegation that she was unable to think, consider, and make meaningful decisions after the attack.[42] The court pointed out that the teacher was able to travel to Italy one month after the event and that there was no evidence the department of social services had actual knowledge of the incident within a reasonable time.

A former probationary teacher unsuccessfully sued his school district claiming that it violated his right to due process in depriving him of his job. An appellate court in New York affirmed that the district's earlier motion for summary judgment was correctly granted since the three-year-limitations period governing personal injury actions was applicable.[43]

Liability Insurance

Where a student was attacked by a peer while riding a school bus, the district's insurer sought further review of the denial of its motion to dismiss. The Supreme Court of Georgia found that because the board was not required by law to insure itself against the type of injuries that the student sustained, the insurer was not liable since the student was not injured as a result of a bus accident or collision.[44]

A school board in Pennsylvania challenged a ruling that its insurance company was not required to defend it in a case where a volunteer molested a student. An appellate court reversed in favor of the board in explaining that the insurer was obligated to defend it in the student's civil rights action.[45] The court declared that although the insurance policy excluded claims involving criminal acts, the volunteer's criminal conduct did not involve the board.

In Indiana, an insurance company sought further review of its obligation to cover a teacher who was injured in an after-school fight between her son and another student that took place at her home. In denying the claim, an appellate court reversed because the fight, although an outgrowth of activities during the school day, was outside of the scope of the policy's coverage.[46] The court cited the teacher's role in the altercation, namely encouraging her son to hit another student with a baseball bat, as not characteristic of an employee who was motivated to serve her employer.

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[42] Howard v. Department of Social Serv., 660 N.Y.S.2d 485 [126 Educ. L. Rep. 1101] (App. Div. 1998) *See* McGehee v. DePoyster, 708 So. 2d 77 [125 Educ. L. Rep 246] (Miss. 1998) (holding that a section 1983 claim in a defamation action was not subject to notice provisions).

[43] Bidnick v. Johnson, 677 N.Y.S.2d 614 [129 Educ. L. Rep. 450] (App. Div. 1998)

[44] Payne v. Twiggs County Sch. Dist., 496 S.E.2d 690 [124 Educ. L. Rep. 458] (Ga. 1998).

[45] Board of Pub. Educ. v. National Union Fire Ins. Co., 709 A.2d 910 [125 Educ. L. Rep. 1261] (Pa. Super. Ct. 1998).

A school librarian challenged a grant of summary judgment in favor of an insurance company that refused to cover him after he sexually assaulted a thirteen-year-old student. An appellate court in Wisconsin affirmed that the insurance company did not have to defend the librarian because the policy's intentional acts exclusion precluded such coverage.[47]

Attorney Fees

In a case from Kansas, after a board ordered the removal of a book discussing homosexuality from the district's libraries, students, parents and a teacher sued the board under section 1983. Following a ruling in favor of the plaintiffs, the board appealed the awarding of attorney fees. The Tenth Circuit affirmed and remanded in determining that the trial court did not abuse its discretion by awarding fewer hours than suggested or that the attorneys were not entitled to expenses incurred prior to recruiting the plaintiffs.[48] However, the Tenth Circuit believed that the trial court abused its discretion in ignoring market rate evidence when setting fees.

In New York, an appellate court affirmed that a school district was liable for attorney fees in a dismissed third party action.[49] The court found that the board was accountable for its frivolous conduct where it tried to delay a student's suit by ignoring advice to the contrary and tried to pressure her to dismiss her claim by filing actions against a series of her classmates.

Tortious Interference with a Contract

A physical education teacher unsuccessfully sued his board and school officials alleging malicious prosecution and tortious interference with a contract when he was suspended pending an investigation and hearing on charges that he abused students. An appellate court in Missouri affirmed a grant of judgment notwithstanding the verdict in favor of the defendants.[50] The court maintained that interviewing the students who claimed that they were abused and passing their statements to the superintendent with a recommendation for the teacher's removal was insufficient to constitute a claim of malicious prosecution. The court added that the lack of evidence of breach of contract precluded the teacher's claim of tortious interference.

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[46] Horace Mann Ins. Co. v. Richards, 696 N.E.2d 65 [126 Educ. L. Rep. 1120] (Ind Ct. App. 1998).

[47] C.L. v. School Dist. of Menomonee Falls, 585 N.W.2d 826 [130 Educ. L. Rep. 290] (Wis. Ct. App. 1998) *See also* Mann Ins. Co. v. Peters, 948 P.2d 80 [122 Educ. L. Rep. 813] (Colo. Ct. App. 1997) (also holding that the intentional acts exclusion applied).

[48] Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243 [129 Educ. L. Rep. 1003] (10 Cir. 1998).

[49] Basil B. v. Mexico Cent. Sch. Dist., 669 N.Y.S.2d 992 [125 Educ. L. Rep. 186] (App. Div. 1998).

Employee Injuries

Where an administrator sued a city board of education and school officials for injuries she incurred from an assault by the father of a student, a trial court in New York granted the defendants' motion for summary judgment.[51] The court observed that the defendants did not have an affirmative duty to protect the administrator even though the father allegedly disregarded a protective order that she obtained against him. The court was satisfied that any breach of the school's duty to protect the administrator did not endanger her or cause her to fear for her safety.

A school board sought further review of a jury verdict that it was liable for injuries that a third grade teacher sustained as she was preparing to escort her class from the schoolyard to the classroom when she was run into by students from another class. An appellate court in New York reversed in favor of the board on the ground that as a governmental entity, it could not be held liable absent a special duty to the teacher by virtue of her status.[52]

Workers' Compensation

Where a temporarily disabled teacher sought additional benefits for the summer recess, the Supreme Court of New Jersey remanded the case to the Division of Workers' Compensation for further factual determinations.[53] The court suggested that if the teacher intended to work during the summer but was prevented from doing so due to her injury, she would have been entitled to temporary disability benefits.

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[50] Davis v. Board of Educ,. 963 S.W.2d 679 [125 Educ. L. Rep. 229] (Mo. Ct. App. 1998).

[51] Johnson v. New York City Bd. of Educ., 676 N.Y.S.2d 444 [128 Educ. L. Rep. 822] (Sup. Ct. 1998).

[52] Sampson v. Board of Educ., 680 N.Y.S.2d 594 [131 Educ. L. Rep. 241] (N.Y. App. Div. 1998). *See* Johnson v. New York City Bd. of Educ., 671 N.Y.S.2d 112 [125 Educ. L. Rep. 772] (App. Div. 1998) (failing to find a special duty owed to the injured teacher).

[53] Outland v. Monmouth-Ocean Educ. Serv. Comm'n, 713 A.2d 460 [127 Educ. L. Rep. 897] (N.J. 1998) *See also* Stofa v. Workers' Compensation Appeal Bd., 702 A.2d 381 [122 Educ. L. Rep. 491] (Pa. Commw. Ct. 1997) (calculating a worker's average weekly wage by dividing his annual salary by twelve rather than 9.2 months).

A school bus driver's aide who was injured when she slipped and fell in a board-sponsored parking lot successfully challenged her denial of benefits. The Supreme Court of Nebraska reversed in favor of the aide in ruling that there was a distinct, causal connection between the board's sponsoring the lot and the aide's injury.[54]

Where a teacher who was unable to engage in seasonal work during the summer was awarded temporary total disability, her board sought further review. The Supreme Court of Nevada affirmed that the teacher was entitled to benefits during the summer because she was injured at work.[55]

A board challenged an award of workers' compensation for a school clerk who injured her back when she tried to lift a chest of ice from the school cafeteria at a family picnic. The Supreme Court of South Carolina reversed in positing that the personal comfort doctrine did not apply since the clerk's activity was not a natural incident of her employment.[56]

Where a school security guard was injured after being attacked by a stray dog while at work, the district unsuccessfully argued that the unexplained assault presented an issue of fact for trial. An appellate court in Illinois affirmed an award of benefits in favor of the guard in deciding that he was clearly on school grounds to protect its property when he was injured.[57]

A music teacher in New York unsuccessfully sought compensation for a disability that she suffered due to multiple chemical sensitivity. An appellate court affirmed that the teacher failed to show that she sustained an accidental injury where there was no record that she suffered any extraordinary event on dates specified in her application for benefits.[58] The court also relied on the fact that the teacher testified that she previously experienced related symptoms at other schools.

In New Jersey, an appellate court affirmed that a bus driver whose vehicle was struck by a car was ineligible for an accidental disability pension.[59] The court indicated that the driver's injury was not the result of a traumatic event since damage to the bus was minimal, no passengers were injured, he did not seek medical attention for six weeks, and he continued working for two and one-half months.

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[54] La Croix v. Omaha Pub. Schs., 582 N.W.2d 283 [128 Educ. L. Rep. 346] (Neb. 1998).

[55] Washoe County Sch. Dist. v. Bowen, 962 P.2d 1233 [129 Educ. L. Rep. 465] (Nev. 1998).

[56] Osteen v. Greenville County Sch. Dist., 508 S.E.2d 21 [131 Educ. L. Rep. 306] (S.C. 1998).

[57] Springfield Sch. Dist. No. 186 v. Industrial Comm'n, 687 N.E.2d 334 [123 Educ. L. Rep. 279] (Ill. Ct. App. 1997).

[58] Knapp v. Vestal Cent. Sch. Dist., 668 N.Y.S.2d 718 [124 Educ. L. Rep. 364] (App. Div. 1998).

[59] Pino v. Board of Trustees, 706 A.2d 793 [124 Educ. L. Rep. 630] (N.J. Super. Ct. App. Div. 1998).

A cafeteria worker challenged the denial of her request for disability benefits when she chose not to accept a part-time job as a receptionist. An appellate court in Louisiana reversed in maintaining that the worker's failure to accept the part-time job did preclude her from continuing to receive temporary total disability benefits.[60]

In Connecticut, a board of education sought further review of an award of workers' compensation to the widow of a school business manager who collapsed and died after delivering a lengthy speech at an arbitration hearing. An appellate court affirmed in favor of the widow.[61] The court was of the opinion that for the purposes of workers' compensation, the school business manager's death occurred during the course of his employment.

Where a school bus driver received workers' compensation for carpal tunnel syndrome, her board sought further review. An appellate court in Ohio affirmed that the driver was entitled to benefits since her claim adequately alleged all the elements necessary for an occupational disease.[62] The court stated that testimony from one of the driver's co-workers was admissible for the limited purpose of aiding the jury in understanding the job duties at issue and to rebut the district's claim that the duties were not strenuous.

A teacher who was injured while participating in a charity basketball game sought further review of the denial of his request for workers' compensation. An appellate court in Oklahoma reversed in favor of the teacher.[63] The court agreed that the teacher was entitled to benefits because the district derived substantial direct benefit from his participation in the game.

Defamation/Intentional Infliction of Emotional Distress

In the first of three cases from Illinois, a former superintendent sued members of a board of education for defamation after they voted for her dismissal. The suit claimed that board members maliciously and intentionally concocted unfounded charges against the superintendent. A federal trial court dismissed the claim against board members who were not specifically named in the action.[64] However, the court refused to dismiss the defamation claim in commenting that while board members were privileged from liability for defamation if their statements were made within the scope of their official duties, the circumstances within which they made their remarks were unclear.

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[60] Bolton v. Grant Parish Sch. Bd., 709 So. 2d 979 [125 Educ. L. Rep. 1379] (La. Ct. App. 1998).

[61] Masko v. Board of Educ. of Wallingford, 710 A.2d 825 [126 Educ. L. Rep. 1057] (Conn. Ct. App. 1998).

[62] Prejean v. Euclid Bd. of Educ., 696 N.E.2d 606 [127 Educ. L. Rep. 402] (Ohio Ct. App. 1998).

[63] Dozier v. Mid-Del Sch. Sys., 959 P.2d 604 [127 Educ. L. Rep. 1088] (Okla. Ct. App. 1998).

[64] Roberts v. Board of Educ., 25 F. Supp.2d 866 [131 Educ. L. Rep. 128] (N.D. Ill. 1998).

An appellate court in Illinois reversed the dismissal of defamation and invasion of privacy charges that a special education teacher brought against a television station. The court reasoned that since the teacher was not a public figure, her suit over her involvement in a situation where one of her students was hit by other students could continue.[65] The court determined that the teacher alleged sufficient facts to support the conclusion that the station acted with actual malice and reckless disregard for truth necessary to bring an invasion of privacy claim.

Where a former employee of a private school brought a defamation action against the board of trustees, an appellate court in Illinois affirmed that its statements in a letter to parents informing them of her dismissal were subject to a reasonably innocent interpretation.[66] The court was of the view that the statement could have been construed as an assessment of the employee's failure to perform in the school's particular setting rather than of her ability to do well in other positions.

In the first of three cases from New York, a school district and teacher challenged the denial of their motion to dismiss a case for intentional infliction of emotional distress and defamation filed by parents of a thirteen-year-old student who alleged the teacher called their daughter a Nazi. In reversing, the court wrote that while the remark was inappropriate and irresponsible, it was not outrageous and extreme enough to support such claims.[67]

After his resignation, a teacher sued his school board and individual board members for defamation when individuals, anonymously, spoke and confirmed to local newspapers that the teacher left his job following an investigation of sexual misconduct. An appellate court in New York affirmed the denial of the defendants' motion for summary judgment.[68] The court noted that the teacher was not a public official who was required to establish that the alleged statements were made with actual malice.

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[65] Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc., 696 N.E.2d 761 [127 Educ. L. Rep. 935] (Ill. App. Ct. 1998).

[66] Dunlap v. Alcuin Montessori Sch., 698 N.E.2d 574 [128 Educ. L. Rep. 1149] (Ill. Ct. App. 1998).

[67] Harville v. Lowville Cent. Sch. Dist., 667 N.Y.S.2d 175 [123 Educ. L. Rep. 844] (App. Div. 1997).

[68] Dec v. Auburn Enlarged Sch. Dist., 672 N.Y.S.2d 591 [126 Educ. L. Rep. 365] (App. Div. 1998).

Where a former principal who was charged with taking school funds counterclaimed by filing a suit for intentional infliction of emotional distress and defamation, an appellate court in New York affirmed the dismissal of his action.[69] The court contended that the action was without merit because there was no allegation that the accusation lacked a reasonable basis and because newspaper statements reporting the incident were truthful.

An assistant superintendent for business services unsuccessfully sued a televison station and others for defamation and intentional infliction of emotional distress. On further review, an appellate court in Texas affirmed a grant of summary judgment in favor of the defendants.[70] In deeming the assistant superintendent a public official for the limited purpose of defamation, the court observed that the television station's use of the terms bid-rigging and racketeering were close enough to allegations made by a school board member to negate charges of a reckless disregard for the truth. The court decided that there was no evidence of actual malice or conduct by the television station to support a claim of intentional infliction of emotional distress.

In Ohio, a teacher unsuccessfully sued the school board for intentional infliction of emotional distress when it chose not to hire him as an athletic coach. An appellate court affirmed that the teacher's rejection in favor of an applicant who was not certified was neither extreme nor outrageous conduct that would have been necessary to support his action.[71] The court was convinced that the board's judgment that the teacher was unqualified for the job did not deprive him of his liberty interest in his good name and professional reputation.

Constitutional Torts

The trend of recent years persists as the number of cases involving student rights under Title IX and section 1983 continues to increase. The first reported case is from the Supreme Court and arose from an action based on teacher to student sexual harassment.

Student Initiated Cases

Where a high school student and her parents in Texas sought damages under Title IX for a teacher's sexual harassment, the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.* affirmed an earlier judgment in favor of the district.[72] In setting the standard necessary for a party to prevail in a title IX action alleging teacher-student sexual harassment, the Court found that the district could not be liable unless a school official with the authority to institute corrective measures had actual notice of, and exhibited deliberate indifferent to, the alleged misconduct.

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[69] Chinese Consol. Benevolent Ass'n v. Tsang, 679 N.Y.S.2d 54 [130 Educ. L. Rep. 232] (App. Div. 1998).

[70] Beck v. Lone Star Broadcasting, Co., 970 S.W.2d 610 [127 Educ. L. Rep. 467] (Tex. Ct. App. 1998).

[71] Katterhenrich v. Federal Hocking Local Sch. Dist. Bd. of Educ., 700 N.E.2d 626 [129 Educ. L. Rep. 776] (Ohio Ct. App. 1997).

Students from Texas who were allegedly sexually molested by a teacher of the same sex unsuccessfully filed suit under title IX. On further review, the Fifth Circuit reversed in pointing out that even though the teacher and students were of the same sex, the pupils had stated a claim under Title IX.[73] However, the court affirmed a grant of summary judgment in declaring that the district had not delegated policy making authority to the principal and that its failure to adopt an official sexual abuse policy did not support a claim of municipal liability.

In the first of three trial court cases from Texas, an elementary school student filed suit under section 1983 alleging deliberate indifference by school officials after she was molested by a substitute teacher. The court denied the district's motion for summary judgment in observing that there were questions of fact as to whether it expressly delegated final decision-making authority to the superintendent.[74] The court further reflected that while the policy of not requiring criminal background checks for substitute teachers did not violate any statutory right that the student enjoyed, questions remained as to the existence and adequacy of school policies concerning the reporting of negative incidents involving substitute teachers.

Where elementary school students alleged that they were deprived of a variety of constitutional rights in connection with their being sexually abused by a teacher, a federal trial court in Texas partially rejected the defendants' motions for summary judgment. The court was satisfied that there were unresolved questions of fact regarding whether the teacher's actions were offensive, arbitrary, capricious, and unrelated to the goal of maintaining a learning atmosphere.[75] However, in asserting that neither the principal nor board had knowledge of the teacher's activities, the court granted their motions for summary judgment.

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[72] 118 S. Ct. 1989 [125 Educ. L. Rep. 1055] (1998).

[73] Black v. Dallas Indep. Sch. Dist., 153 F.3d 211 [128 Educ. L. Rep. 1006] (5th Cir. 1998).

[74] Mirelez v. Bay City Indep. Sch. Dist., 992 F. Supp. 916 [125 Educ. L. Rep. 111] (S.D. Tex. 1998).

[75] Doe v. Beaumont I.S.D., 8 F. Supp.2d 596 [128 Educ. L. Rep. 215] (E.D. Tex. 1998). *See* Burnell v. Williams, 997 F. Supp.886 [126 Educ. Rep. 227] (N.D. Ohio 1998) *and* Plumeau v. School Dist. #40 130 F.3d 432 [122 Educ. Rep. 588] (9th Cir. 1997) (precluding liability under section 1983 in both instances).

A high school student who accused a teacher of sexual misconduct unsuccessfully sued a teacher's association and its representative for slander, invasion of privacy, and violations of title IX. A federal trial court in Texas granted the association's motion for summary judgment since it neither expressly nor impliedly authorized the spreading of lies and rumors about the student.[76] The court also refused to exercise supplemental jurisdiction over the student's state law claims that teachers allegedly spread rumors and lies about her.

The Seventh Circuit reversed and remanded after a trial court in Indiana issued jury instructions which were incorrect statements of the law.[77] At trial, a student sued her school district for sexual harassment and abuses in violation her rights under title IX. The appellate court held that the thirteen-year-old plaintiff, who was considered an elementary school student under state law, could not welcome the advances of a twenty-one-year-old school employee.

Where a trial court in Illinois dismissed a sexual harassment claim filed by a student who attended a high school operated by a state university, she was allowed to refile her individual claim under title IX. On appeal, the Seventh Circuit affirmed that the requirement of actual knowledge was an appropriate limitation upon liability in suits based on student-on-student harassment.[78] The court believed that the student alleged facts to support each element of her claim that university officials and others violated title IX.

In a second case from Illinois, a federal trial court rejected a board's motion for summary judgment where there were sufficient questions of facts surrounding allegations that high school students had sexual relations with a teacher.[79] According to the court, while there was no evidence that the defendants had actual knowledge of the sexual relationships, they were not entitled to immunity since there were sufficient facts to warrant a jury determination as to whether they turned a blind eye to the teacher's conduct. The court denied the board's motion as to the section1983 claim based on the possibility that the board's policies or practices facilitated the abuse. The court ascertained that before hiring the teacher, school officials knew that he had divorced his wife to marry a recent graduate and former student with whom he may have had an inappropriate sexual relationship.

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[76] Schrum v. Land, 12 F. Supp.2d 576 [129 Educ. L. Rep. 165] (S.D. Tex. 1998).

[77] Mary M. v. North Lawrence Community Sch. Corp., 131 F.3d 1220 [122 Educ. L. Rep. 980] (7th Cir. 1997).

[78] Doe v. University of Illinois, 138 F.3d 653 [124 Educ. L. Rep. 812] (7th Cir. 1998).

[79] Doe v. Board of Educ. of Consol. Sch. Dist. 230, 18 F. Supp.2d 954 [130 Educ. L. Rep. 184] (N.D. Ill. 1998).

An elementary school student in Missouri challenged a grant of summary judgment in her title IX and section 1983 suit alleging her school district failed to protect her from sexual harassment by a classmate. The Eighth Circuit affirmed in favor of the district since the sole evidence showing that the principal treated the student differently because she was a female was his remark that "boys will be boys" concerning the inappropriate pictures that another child drew as they rode together on a school bus.[80] The court explained that the principal acted appropriately in speaking with the offending student immediately after the incident occurred.

The Ninth Circuit affirmed a trial court ruling from California that a student was subjected to a hostile environment in violation of title IX.[81] The court indicated that even after the student and her parents notified school officials, they failed to take reasonable steps to prevent the harassment.

Where a special education student in New Mexico committed suicide after being suspended and driven home from school, his parents sought further review of a grant of summary judgment in favor of the district and various officials. The Tenth Circuit reversed in favor of the parents on their due process claim in applying the danger creation theory since the child was a member of a limited, definable group, namely special education students who have expressed thoughts of suicide.[82] Additionally, the court reasoned that suspending the student and taking him home where he would be alone with access to firearms put him at substantial risk since school employees had some knowledge that he was distraught and suicidal. The court concluded that leaving the student home alone under the circumstances was reckless behavior for which the district could be liable.

In the first of two cases from Georgia, a federal trial court granted motions for summary judgment in favor of a district and principal who were sued over the sexual involvement between a thirteen-year-old student and her physical education teacher.[83] The court posited that the defendants did not violate title IX because they lacked actual notice of the teacher's activities and absent evidence of deliberate indifference, the student's section 1983 claim was without merit.

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[80] Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776 [125 Educ. L. Rep. 388] (8th Cir. 1998).

[81] Oona R-S by Kate S. v. McCaffrey, 143 F.3d 473 [126 Educ. L. Rep. 589] (9th Cir. 1998).

[82] Armijo By and Through Chavez v. Wagon Mound, 159 F.3d 1253 [130 Educ. L. Rep. 496] (10th Cir. 1998).

[83] Davis v. DeKalb County Sch. Dist., 996 F. Supp. 1478 [126 Educ. L. Rep. 211] (N.D. Ga. 1998).

Students in Georgia who were sexually assaulted by a school security guard challenged a grant of summary judgment in favor of the district in their title IX action. The Eleventh Circuit affirmed that the district was not liable as there was no evidence to show the board or superintendent had knowledge of the guard's misconduct and failed to act.[84] The court added that the guard's alleged practice of taking female students to an abandoned house was not a custom supporting section 1983 liability.

Similarly, two female students brought a sexual discrimination claim against their school district under title IX after they had secret off-campus meetings with a substitute teacher. The federal trial court in South Carolina granted the district's motion to dismiss in maintaining that it could only have been liable if a school official with actual knowledge of the abuse and the duty to supervise the employee failed to do so.[85]

A student appealed a grant of summary judgment in favor of his school board in his suit that alleged that he was a victim of same-sex sexual harassment at the hands of a teacher. The Supreme Court of Alabama affirmed that while the allegation could have supported a claim under title IX, the board was not liable because once it learned of the teacher's behavior it took prompt action to correct it and to prevent it from occurring in the future.[86]

Two former middle school students and their mother sued their district alleging that they were sexually harassed by a classmate. The federal trial court in New Hampshire denied the district's motion for summary judgment as there were disputed issues of fact as to whether it took adequate steps to prevent the harassment.[87] In addition, the court stated that the mother lacked standing to bring a title IX action in her own right.

In Ohio, a student alleged violations of his rights under section 1983 and title IX based on the district's reckless indifference toward a sexual relationship that he had with a female teacher. A federal trial court denied the board's motion for summary judgment since the teacher's conviction for sexual battery was sufficient to allege unreasonable interference with the student's school performance.[88] Further, the court believed that there were issues of fact over the effectiveness of the district's response to the teacher's actions.

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[84] Floyd v. Waiters, 133 F.3d 786 [123 Educ. L. Rep. 51] (11th Cir. 1998).

[85] Doe v. Berkeley County Sch. Dist., 989 F. Supp. 768 [124 Educ. L. Rep. 575] (D.S.C. 1997) *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F3d. 1223 [125 Educ. L. Rep. 1074] (5th Cir. 1997) (holding that a school system was not liable under title IX).

[86] H.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 [130 Educ. L. Rep. 952] (Ala. 1998).

[87] Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467 [125 Educ. L. Rep. 69] (D.N.H. 1998).

[88] Doe v. New Philadelphia Pub. Schs. Bd. of Educ., 996 F. Supp. 741 [126 Educ. L. Rep. 146] (N.D. Ohio 1998).

A middle school student who was injured by a classmate sued the county board of education and school officials asserting claims under title IX and section 1983. In rejecting the board's motion to dismiss, a federal trial court in West Virginia acknowledged that title IX does not preempt suit under section 1983 when the facts implicate constitutional rights.[89] The court was of the opinion that the student was the victim of violence motivated by gender, that the board had actual notice of the harm as a teacher was a witness to the incident, and that there was evidence that it knowingly failed to take appropriate remedial actions in response to a hostile sexual environment.

Employee Initiated Cases

In Pennsylvania, the husband of a day care teacher who was shot and killed while in her classroom challenged the dismissal of his 1983 action against the district from which the center leased space. Among other allegations, the suit claimed that there was a state-created danger present since ongoing school construction work resulted in an improperly secured back door that led to previous instances of vandalism and a prior assault. The Third Circuit affirmed that there was no state-created danger where there was mere negligence coupled with no indication that school officials placed the teacher in a foreseeable situation of harm.[90]

A school system in Virginia appealed a ruling in favor of a female school psychologist who claimed that she was a victim of sexual harassment and retaliation in violation of title VII. The Fourth Circuit reversed in ruling that assigning the psychologist extra work did not constitute tangible employment action sufficient to impose liability on the district for sexual harassment by her supervisor.[91]

In a case from Missouri, a music coach sought further review of a judgment in favor of his school district and band director after he sued them for allegedly violating his rights under title VII and section 1983. The Eighth Circuit affirmed in favor of the district since it was a governmental entity that could not be liable under section 1983 for the actions of its employees.[92] The court also affirmed the dismissal of the section 1983 claim against the band director because the coach's suit was not specifically made against him in his official capacity. Finally, the court upheld the dismissal of the title VII action based on the coach's complaint that the band director engaged in disparate treatment of black and white students. The court noted that there cannot be a title VII violation where an employee complains of a school's responsibility to its pupils because such an action is outside of a staff member's duties.

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[89] Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp.2d 618 [130 Educ. L. Rep. 579] (S.D. W. Va. 1998).

[90] Morse v. Lower Merion Sch. Dist., 132 F.3d 902 [122 Educ. L. Rep. 1178] (3rd Cir. 1997).

[91] Reinhold v. Commonwealth of Va., 151 F.3d 172 [128 Educ. Rep. 588] (4th Cir. 1998).

[92] Artis v. Francis Howell North Band Booster Assoc., 161 F3. 1178 [131 Educ. L. Rep. 23] (8th Cir. 1998).

Elementary school teachers sued their school district and principal for alleged violations of title VII, the First Amendment, and the Texas Commission on Human Rights Act. A federal trial court refused to grant the defendants' motion to dismiss since the teachers adequately exhausted administrative remedies and statements by the principal may have contributed to a hostile work environment under title VII.[93] Additionally, the court permitted the suit to proceed insofar as it found that the teachers' reporting the principal's conduct was a matter of public concern that was protected by the First Amendment.

Where a female janitor sued her school district and several administrators for sexual harassment, a federal trial court in Pennsylvania rejected the defendants' motion to dismiss.[94] The court was satisfied that the woman stated a case for supervisory liability on the part of the assistant principal who took no action after being informed that she was subjected to continuous harassment by her supervisor. Moreover, the court found that the woman stated a case for intentional infliction of emotional distress because the assistant principal took retaliatory action against her for making the complaints.

A teacher sued her board and school officials, including the board's attorney for wrongful discharge in violation of her constitutional rights under section 1983 when she was dismissed for using a curriculum which promoted racial understanding and harmony. The federal trial court in New Mexico rejected the attorney's motion to dismiss in holding that his actions on behalf of the school board constituted state action[95] The court also dismissed part of the suit in deciding that the teacher's interest in continuing to teach the curriculum of her choice was not a property or liberty right that was protected by the Due Process Clause.

Conclusion

School districts again successfully advanced immunity defenses in the face of increased litigation dealing with sexual abuse and assault. This past year also witnessed an increase in the number of defamation cases while there was a significant drop in suits involving notice of claim.

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[93] Matthews v. High Island Indep. Sch. Dist., 991 F.Supp. 840 [125 Educ. L. Rep. 44] (S.D. Tex. 1998).

[94] McLaughlin v. Rose Tree Media Sch. Dist.,1 Fed. Supp.2d 476 [126 Educ. L. Rep. 942] (E.D. Pa. 1998).

[95] Cordova v. Vaughn Mun. Sch. Dist. Bd. of Educ., 3 F. Supp.2d 1216 [127 Educ. L. Rep. 226] (D.N.M. 1998).

7
SPORTS

Linda A. Sharp

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Introduction

This chapter reviews cases in K-12 and higher education dealing with student-athletes and coaches as well as athletic directors, facilities, and associations. The chapter does not discuss litigation pertaining to the instruction of physical education.

Eligibility

This section reviews fourteen cases: two challenge longevity rules, one concerns recruiting, two discuss academic eligibility requirements, two address transfer rules, two relate to disciplinary sanctions, one deals with membership in a high school athletic association, two involve drug testing of participants in extracurricular activities, one reviews salary caps for coaches, and one deals with the NCAA Postbaccalaureate Bylaw.

Longevity

The Oregon state school activities association has an eight-semester eligibility rule that renders students who have completed eight semesters of high school ineligible for interscholastic sports competition. Under this rule, a fifth year senior with attention deficit disorder who had to repeat the tenth grade due to academic problems was declared ineligible to play football. In his challenge to the rule under the Americans with Disabilities Act (ADA), the federal district court granted the student's request for a preliminary injunction that allowed him to participate in football during his senior year.[1] In holding that the student was disabled within the meaning of the ADA, the court noted that he had shown that his requested waiver was a reasonable accommodation of his disability. The court concluded that the student should be allowed to play because he was neither older nor more athletically experienced than other seniors and was not retained in school to gain a competitive advantage in athletics.

A star high school baseball player questioned his ineligibility for his senior year under an eight-semester rule. According to the rule, once students enter ninth grade, they have a maximum of four fall and four spring semesters of athletic eligibility. The student, who was unable to complete high school within four years because he repeated ninth grade due to poor academic performance stemming from depression and psychological problems, unsuccessfully petitioned the athletic association for an extra year of eligibility. A trial court enjoined the association from enforcing its rule but the appellate court reversed. On further review, the Supreme Court of Indiana found that the restitution rule, which required schools to forfeit victories if a trial court improperly enjoined its enforcement and thereby allowed an ineligible athlete to play, was not manifestly unreasonable.[2] The court decided that absent fraud, illegality or abuse of civil or property rights, the judiciary should not interfere in the internal affairs of voluntary membership organizations.

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[1] Bingham v. Oregon Sch. Activities Ass'n, 24 F. Supp. 2d 1110 [130 Educ. L. Rep. 1251] (D. Ore. 1998);

Recruiting

A high school sought to enjoin the state athletic association from enforcing a rule that prohibited undue influence in recruiting student-athletes on the basis that it violated the First Amendment freedom of speech protections. The rule had been used to try to prohibit the football coach from sending letters to students, who had already been admitted to the school, advising them of spring practice. A federal trial court in Tennessee granted the school's request for a permanent injunction in observing that the rule violated the First Amendment on its face and as applied to the letter in question.[3] The court indicated that as a state actor, the association's rule was facially invalid because it was not content neutral and there were less restrictive methods of preventing undue influences upon student-athletes such as prohibitions on fraudulent conduct and intimidation, which would not run afoul of First Amendment considerations.

Academic Eligibility

In the first of two cases dealing with academic eligibility under National Collegiate Athletic Association (NCAA) requirements, a student who allegedly suffered from generalized anxiety disorder with a specific phobia related to testing sought an order pursuant to the ADA that would have required the NCAA to recognize non-standard, untimed American College Test (ACT) scores for purposes of eligibility. A federal trial court in Missouri denied the student's request for a preliminary injunction.[4] The court decreed that even though the NCAA operates a place of public accommodation for the purposes of the ADA, the student did not demonstrate the substantial likelihood of success on the merits of the claim that he had a disability under state law. The court noted that the student was not seriously evaluated for mental impairments until after it was evident that he could not meet the NCAA's required ACT score to attain qualifier status. The court believed that the student's poor test scores related to lack of effort and preparation rather than a mental impairment under the ADA.

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[2] Indiana High Sch. Athletic Ass'n, Inc., v. Reyes, 694 N.E.2d 249 [125 Educ. L. Rep. 848] (Ind. 1997).

[3] Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 13 F. Supp. 2d 670 [129 Educ. L. Rep. 291] (M.D. Tenn. 1998).

[4] Tatum v. National Collegiate Athletic Ass'n, 992 F. Supp. 1114 [125 Educ. L. Rep. 134] (E.D. Mo. 1998).

A student with a learning disability challenged the NCAA's declaration that he was a nonqualifier because the special education classes that he took in high school did not satisfy the requirement that athletes complete thirteen core courses. Further, since the high school could not show that the special education courses were the equivalent of regular classes, the NCAA Council Subcommittee on Initial-Eligibility Waivers did not excuse the core course requirement based on its judgment that the student would have been unable to succeed academically during his first year of college if he participated in athletics. The student sued the NCAA, its eligibility clearinghouse, the national testing service, and the state university claiming that they violated the ADA, the Rehabilitation Act, a state anti-discrimination statute, and the Sherman Act. The federal district court in New Jersey partially granted the defendants' motion for summary judgment.[5] The court granted the motion regarding the Sherman Act claim in pointing out that eligibility rules are not related to the NCAA's commercial or business activities. Turning to the ADA claim, the court reflected that while the testing service and NCAA clearinghouse were not subject to suit, questions of fact precluded the NCAA's motion.

Transfer

In the first of two cases from Indiana dealing with transfer rules, a varsity swimmer challenged a rule that prohibited him from joining the team for one year after he moved from a private to a public school because of academic and financial difficulties. When an appellate court affirmed an injunction against the enforcement of the rule, the state athletic association sought further review. The Supreme Court of Indiana reversed in favor of the association.[6] The court was satisfied that the association did not abuse its adjudicatory authority by acting arbitrarily and capriciously since the student did not fall within the thirteen special criteria for immediate eligibility. The court posited that engaging in a factual inquiry into the motivation for every transfer would have imposed an unwarranted burden upon the association.

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[5] Bowers v. National Collegiate Athletic Ass'n, 9 F. Supp. 2d 460 [128 Educ. L. Rep. 670] (D.N.J. 1998).

[6] Indiana High Sch. Athletic Ass'n, Inc., v. Carlberg, 694 N.E.2d 222 [125 Educ. L. Rep. 821] (Ind. 1997).

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A female basketball player who was denied eligibility because her transfer to a new school was deemed to have been primarily for athletic reasons obtained a preliminary injunction that permitted her to play. The student argued that she and her parents moved in order to be closer to her grandparents who were suffering severe medical problems. On further review, an appellate court in Indiana affirmed that the association acted arbitrarily and capriciously because there was evidence of a bona fide move for legitimate family, health, and employment concerns rather than for athletic reasons.[7]

Discipline

A student, who was suspended from school for bringing alcohol to a basketball tournament in which his school was participating, unsuccessfully challenged his exclusion based on his claim that having beer at another school was not a school-sponsored activity. A federal trial court in Kentucky granted the school district's motion for summary judgment.[8] The court reasoned that in light of the schools teaching students the shared values of a civilized social order, a sporting event in which a student's school is a participant, regardless of where it takes place, is a school-sponsored activity. The court was of the opinion that the suspension was neither beyond the authority of the principal nor was the disciplinary policy applied unconstitutionally.

A father who was a spectator at a high school football game in which his son played allegedly struck the referee. The athletic association fined the school, placed the school on probation, and directed the school not to participate in an event at which the father was present. Subsequently, the father failed to enjoin the association from enforcing the sanctions. An appellate court in Alabama affirmed the dismissal of the father's complaint.[9] The court explained that the judiciary should not interfere with the internal operations of a voluntary association unless its actions are the result of fraud, lack of jurisdiction, collusion, or arbitrariness.

Membership in High School Athletic Association

Two nonpublic high schools challenged the denial of their petition to annul the denial of their applications for membership in a particular section of the state public high school athletic association. An appellate court in New York affirmed in determining that the applications were rejected because they did not receive a majority vote from other member schools.[10] In response to the applicants' claim that they were both denied procedural due process and admission because they were Catholic schools, the panel ruled that the schools failed to demonstrate a constitutionally-protected interest in membership in this section and that the lower court properly rejected their due process claim.

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[7] Indiana High Sch. Athletic Ass'n, Inc., v. Wideman, 688 N.E.2d 413 [122 Educ. L. Rep. 1268] (Ind. Ct. App. 1997).

[8] Pirschel v. Sorrell, 2 F. Supp. 2d 930 [127 Educ. L. Rep. 124] (E.D. Ky. 1998).

[9] Marshall v. Alabama High Sch. Athletic Ass'n, 717 So. 2d 404 [129 Educ. L. Rep. 881] (Ala. Civ. App. 1998).

Drug Testing

A district in Indiana implemented a random drug testing program using urinalysis, which prohibited high school students from participating in extracurricular activities, including athletic teams, student council, and all clubs, unless they and their parents consented to testing for drugs, alcohol, and tobacco. Subsequently, four students whose parents refused to consent to testing were barred from participating in various activities and they unsuccessfully challenged the program. The Seventh Circuit affirmed a grant of summary judgment in favor of the district in asserting that the random drug testing program did not violate the Fourth Amendment.[11] The court was convinced that *Vernonia School District 47J v. Acton*[12] was controlling because even though the drug testing program at bar included extracurricular activities other than athletics, participation in these activities was voluntary, students assumed leadership roles in school, and it was a privilege to engage in these activities. Further, the court maintained that the linchpin of the program was to protect the health of students and administrators had to have methods at their disposal to deter conduct that disrupts the school environment.

Conversely, the Supreme Court of Colorado struck down a suspicionless drug testing policy applied to high school marching band members as violating the Fourth Amendment.[13] In reversing an earlier judgment in favor of the district, the court commented that marching band members have higher expectations of privacy than student-athletes. In addition, the court acknowledged that the testing program was not limited to students who voluntarily chose to participate in an athletic activity since those who enrolled in a for-credit instrumental music class would also have been subject to testing. The court concluded that the program was not efficacious since it included student groups that were not shown to have added to the drug problem and there was no demonstrated risk of immediate physical harm to members of the marching band.

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[10] *In re* Kellenberg Memorial High Sch. v. Section VIII of the N.Y. State Pub. High Sch. Athletic Ass'n, Inc., 679 N.Y.S. 2d 660 [130 Educ. L. Rep. 852] (App. Div. 1998).

[11] Todd v. Rush County Sch., 133 F. 3d 984 [125 Educ. L. Rep. 18] (7th Cir. 1998).

[12] 515 U.S. 646 [101 Educ. L. Rep. 37] (1995).

[13] Trinidad Sch. Dist. No. 1 v. Lopez, 963 P. 2d 1095 [129 Educ. L. Rep. 812 (Colo. 1998).

Salary Cap for Coaches

Basketball coaches prevailed in their challenge to a NCAA rule that set a salary cap for entry level positions. The coaches based their action on antitrust grounds, alleging that the rule violated the Sherman Act as a restraint of trade. The federal district court in Kansas granted the coaches' motion for summary judgment and issued a permanent injunction against the promulgation or reenactment of the rule when it ascertained that the NCAA failed to establish that the plan would have enhanced competition or promoted a legitimate, competitive goal. Thereafter, the district court imposed sanctions and attorney fees against the NCAA. On appeal, the Tenth Circuit affirmed that the compensation limit was an unlawful restraint of trade under a rule of reason analysis.[14] Turning to the sanctions and fees, the court set aside the daily fines for failing to pay attorney fees on the ground that this was criminal contempt imposed without following essential procedures.[15] The Supreme Court subsequently denied the NCAA's petition for a writ of certiorari.[16]

Postbaccalaureate Bylaw

In a case from Pennsylvania, a student challenged the NCAA Postbaccalaureate Bylaw that prevents individuals from participating in intercollegiate athletics at postgraduate institutions other than the ones from which they obtained their undergraduate degrees. The student had played volleyball at her undergraduate institution, she graduated, and went to a different school for her graduate work because her undergraduate school did not offer the program she wished to study. The student then sought to continue to play volleyball while at graduate school. The student unsuccessfully sued the NCAA based on her claim that it violated the Sherman Act and title IX. On further review, the Third Circuit affirmed the dismissal of the antitrust claim in declaring that the Act was inapplicable to NCAA activities which do not pertain to its commercial activities. The court was of the view that even if the Sherman Act had been applicable, the challenged rule was not an unlawful restraint of trade. At the same time, the court reversed in remarking that the allegation that the NCAA collected dues from its members which received federal funds was sufficient to state a claim that it received federal financial assistance under title IX.[17] As the Supreme Court has agreed to hear an appeal in this case, it is likely to be revisited in the next year's edition of the *Yearbook of Education Law*.[18]

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[14] Law v. National Collegiate Athletic Ass'n, 134 F. 3d 1010 [123 Educ. L. Rep. 510] (10th Cir. 1998).

[15] Law v. National Collegiate Athletic Ass'n, 134 F. 3d 1025 [124 Educ. L. Rep. 33] (10th Cir. 1998).

[16] National Collegiate Athletic Ass'n v. Law, *cert. denied*, 119 S. Ct. 65 [129 Educ. L. Rep. 928] (1998).

Equality of Programs

Gender

The first two of the six cases dealing with allegations of inequity in the provision of sport programs arose in university settings. Female athletes in New York filed a title IX suit which led to the recognition of women's ice hockey as a varsity sport. When the students sought attorney fees, a federal district court noted that the final settlement agreement only provided for the women's hockey team to be granted varsity status as a non-emphasized sport for five years.[19] As such, the court decided that since the women's team did not have parity with the men's team, the final amount of attorney fees awarded should be reduced by 30%.

A student who was recruited to play volleyball was promised a scholarship that she never received because the school lacked the funds filed a title IX action against her university. The suit alleged both that the funds for women's sports were not allocated on a gender-equitable basis and that other facets of the program, including medical care, were not comparable to what was available to men. A federal district court in Alabama granted the university's motion for summary judgment.[20] The court believed that the student's claims were not timely since they did not meet the series-of-related acts standard to establish a continuing violation.

The parents of female athletes in Virginia sued the state's high school athletic league claiming that it denied their children equal treatment since girls' sports were played in different seasons depending on the division in which a school competed while boys' seasons were uniformly scheduled regardless of division. This disparity, the parents argued, resulted in reduced opportunities to obtain college athletic scholarships and sometimes required female athletes who participated in multiple sports to give up one or more sports. A federal district court in Virginia denied the league's motion to dismiss since the parents stated a claim under title IX in alleging that the league was a recipient of federal financial assistance and that female students were subjected to discrimination in an educational program based on sex.[21]

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[17] Smith v. National Collegiate Athletic Ass'n, 139 F. 3d 180 [129 Educ. L. Rep. 32] (3rd Cir. 1998).

[18] National Collegiate Athletic Ass'n v. Smith, 119 S. Ct. 31 [129 Educ. L. Rep. 926] (1998).

[19] Bryant v. Colgate Univ., 996 F. Supp. 170 [125 Educ. L. Rep. 1237] (N.D.N.Y. 1998).

[20] Beasley v. Alabama State Univ., 3 F. Supp. 2d 1325 [127 Educ. L. Rep. 260] (M.D. Ala. 1998).

Members of a girls' high school varsity softball team and their father sued their board under title IX based on disparities between their program and the boys' baseball programs. A federal trial court in Florida granted the plaintiffs' motion for declaratory relief while ordering the district to submit a plan for a remedy based on inequalities with respect to the scoreboard, batting cage, bleachers, lighting, and other amenities related to the softball field.[22]

Female wrestlers from a high school in Texas who were denied permission to participate in matches against boys sued their district, the interschool wrestling association, and the association that represented wrestling officials under title IX, equal protection, and state laws prohibiting gender discrimination in education. A federal trial court granted the defendants' motion for summary judgment only with regard to the title IX claim.[23] The court observed that gender segregation was permissible since wrestling is a contact sport. The court permitted the students' claims for compensatory damages under section 1983 to proceed to trial since there were unresolved issues of material fact.

A civil rights organization in Michigan joined with the parents of female student-athletes in suing the state's high school athletic association alleging that it excluded them from opportunities to participate in interscholastic athletics and violated title IX by subjecting them to unequal treatment and benefits. A federal district court rejected the association's motion for summary judgment.[24] The court reasoned that the students were entitled to conduct discovery on the association's claim that it was not the recipient of federal funding.

Four cases dealt with issues of sexual harassment or abuse related to coaches and/or sport programs. In the sole case from higher education, a former student unsuccessfully sued her university and several football players that she accused of rape based on title IX and the Violence Against Women Act (VAWA). On further review, the Fourth Circuit partially reversed in favor of the student.[25] The court found that the student alleged sufficient facts to support a hostile environment claim under title IX after deciding that it was appropriate to use title VII standards on this allegation. The court added that the student stated a claim under the VAWA and that Congress did not exceed its authority in passing this statute under the commerce clause.

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[21] Alston v. Virginia High Sch. League, 176 F.R.D. 220 [123 Educ. L. Rep. 218] (W.D. Va. 1997).

[22] Daniels v. School Bd. of Brevard County, Fl., 985 F. Supp. 1458 [123 Educ. L. Rep. 1153] (M.D. Fla. 1997).

[23] Barnett v. Texas Wrestling Ass'n, 16 F. Supp. 2d 690 [129 Educ. L. Rep. 1041] (N.D. Tex. 1998).

[24] Communities for Equity v. Michigan High Sch. Athletic Ass'n, 26 F. Supp. 2d 1001 [131 Educ. L. Rep. 186] (W.D. Mich. 1998).

[25] Brzonkala v. Virginia Polytechnic Inst., 132 F. 3d 949 [122 Educ. L. Rep. 1193] (4th Cir. 1997).

In Arizona, former high school students sued their track coach and the district for sexual assault. After a trial court granted the defendants' motions for summary judgment based on the statute of limitations, the students sought further review. An appellate court affirmed that the statute of limitations was not tolled during the time when the students alleged that they were psychologically unable to understand the causal connection between their emotional problems and their abuse at the hands of the coach. The Supreme Court of Arizona subsequently vacated and remanded for a determination of whether the defendants were equitably estopped from asserting a limitations defense based on inducement to forbear filing suit.[26] The plaintiffs, who attended the school during the 1970s and 1980s, claimed that the coach's instructions not to disclose the sexual nature of the relationship formed the basis of their charge that there was an inducement to forbear filing suit.

Where a student alleged that he was sexually abused and harassed by his teacher/coach over a four-year period, a trial court granted the board's motion for summary judgment based on its defense that title IX precluded a claim of same-sex harassment. On appeal, the Supreme Court of Alabama affirmed, but reasoned that sexual harassment of a student by a teacher/coach of the same sex could support a claim under title IX.[27] Even so, the court stated that the board was not liable because until the student reported the harassment, no official with supervisory authority knew of it, and once the board learned of the misconduct it took prompt corrective action to prevent it from occurring in the future.

Two female high school students filed a title IX action against their district based on their claim that a substitute physical education teacher engaged in sexual relations with them while they were in ninth grade. A federal trial court in South Carolina granted the district's motion to dismiss.[28] In relying on the actual knowledge standard of liability, the court held that the district was not liable since it was unaware of the secret meetings between the students and the teacher until after the relationships were terminated.

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[26] Nolde v. Frankie, 964 P. 2d 477 [129 Educ. L. Rep. 837] (Ariz. 1998).

[27] H.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 [130 Educ. L. Rep. 952] (Ala. 1998).

[28] Doe v. Berkeley County Sch. Dist., 989 F. Supp. 768 [124 Educ. L. Rep. 575] (D.S.C. 1997).

Tort

In 1998, thirty-three tort cases involved sports. The first seven cases dealt with intentional torts. Of the remaining twenty-six negligence cases, twenty-four concerned participants while the final two involved spectators.

Intentional

Fraudulent Misrepresentation

A basketball player from a community college was recruited to play for a four-year institution in Texas, and assistant coaches had extensive mail and telephone contacts with him and made approximately ten recruiting trips to his home. When the student agreed to play for the university, he enrolled in nine hours of correspondence courses to meet the number of credit hours necessary for eligibility. After it came to light that members of the basketball staff doctored the student's answers on examinations, he had to sit out a season before transferring to another university. Subsequently, the student sued the university for fraud, tortious interference with his prospective business opportunities in college and professional basketball, outrageous conduct, and other tort and contract claims. When a trial court in Missouri dismissed the action for lack of personal jurisdiction, the player sought further review.[29] An appellate court reversed, indicating that the university's contacts with the forum state during the player's recruitment supported the exercise of personal jurisdiction.

Defamation

In New York, a former teacher/coach sued his school district for defamation, fraud, breach of contract, and intentional infliction of emotional distress in light of a newspaper article which stated that he resigned from his job after an investigation of alleged sexual misconduct with female students. According to the article, board members confirmed the allegations of impropriety against the teacher. A trial court rejected the defendants' motion for summary judgment. On further review, an appellate panel found that because the teacher was not a public official, he did not have to show that the alleged defamatory statements were made with actual malice.[30]

A former high school volleyball coach sued the school district and its officials for comments made to the parents of her students after she lost her job. The allegedly defamatory statements were that the coach "was being replaced for the betterment of the program" and that "when it all comes out in the open, you parents would not want her as the volleyball coach." A federal trial court in Nevada partially denied the defendants' motion to dismiss.[31] The court decreed that the statement that "when it all comes out . . ." was a mixed message that was susceptible of defamatory construction. However, the court posited that the comment relating to the "betterment of the program" was not actionable since it was pure opinion.

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[29] Davis v. Baylor Univ., 976 S.W.2d 5 [129 Educ. L. Rep. 864] (Mo. Ct. App. 1998).

[30] Dec v. Auburn Enlarged Sch. Dist., 672 N.Y.S. 2d 591 [126 Educ. L. Rep. 365] (App. Div. 1998).

Hazing

Where a high school football player in Utah was hazed by teammates who taped him, while nude, to a towel rack and brought a young woman whom he had dated into the room, the federal trial court dismissed his civil rights claims against the coach, principal, and district. On further review, the Tenth Circuit upheld the dismissal of the harassment claim under title IX because the student could not establish that the hostility was sexual. At the same time, the court reversed in asserting that the student stated a First Amendment claim because he alleged that he was denied the benefit of participating on the football team after he told his parents and school officials about the hazing. On remand, the federal trial court granted the defendants' motion for summary judgment.[32] Following full discovery on the First Amendment claim, the court pointed out that the player's speech did not cause him to be barred from the team insofar as the coach and principal made an earnest attempt to persuade him to return to it after he reported the incident.

Section 1983

The following three section 1983 cases involved football. Two dealt with the deaths of players while one concerned injury to a referee. In Texas, a high school football player died from heat exhaustion during the first day of practice which consisted of more than four hours of intense activity in high heat and humidity. Even though the player complained of discomfort and showed signs of heat exhaustion, the coaches ordered him to continue with the drills. After the player collapsed, he did not receive any medical attention as the coaches continued drills and conducted a meeting. When the player did receive attention, it was from untrained teenage team managers. The player died within several hours and his parents brought a section 1983 action against the district, coaches, trainer, and other officials, alleging that they violated their son's rights to life, liberty, health, safety and bodily integrity. A federal trial court in Texas partially granted the defendants' motion to dismiss for failure to state a claim.[33] However, the court partially permitted the parents claim to proceed in acknowledging that due process protects a student from being run to death in an overly strenuous practice in which he is denied water, rest, and medical attention.

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[31] Riggs v. Clark County Sch. Dist., 19 F. Supp. 2d 1177 [130 Educ. L. Rep. 602] (D. Nev. 1998).

[32] Seamons v. Snow, 15 F. Supp. 2d 1150 [129 Educ. L. Rep. 642] (D. Utah 1998).

In the first of two cases from Pennsylvania, the father of a high school football player who collapsed during practice, and later died, unsuccessfully brought a section 1983 action against the district. Even though the player suffered leg cramps during a morning practice in extreme heat, he returned to play and was told to drink fluids at the lunch break. In the afternoon, the player again suffered leg cramps and was returned to practice. The player did not receive any medical attention and no certified athletic trainer was at the practice since the board chose not to hire one. That evening, the player collapsed at home, was taken to a hospital where he suffered respiratory abnormalities, and died. In response to the parents' suit, a federal trial court granted the district's motion to dismiss.[34] The court was of the opinion that the one-time decision not to hire an athletic trainer was not an official policy of the district that would support recovery under section 1983. In addition, the court ruled that the district did not have an affirmative duty under the due process clause to protect the player by providing a trainer.

A college football player struck a referee and rendered him unconscious after the referee called an unsportsmanlike conduct penalty on him. The referee, who also sustained facial injuries that required three surgeries and left a scar, partial hearing loss, and a partial loss of sensation in his face, unsuccessfully sued a state university under section 1983. In addition, the university suspended the player from the team, withdrew his financial aid, and expelled him from school. A federal district court in Pennsylvania granted the university's motion to dismiss.[35] The court maintained that the athlete was not a state actor since the university's relationship with its football players falls short of establishing the necessary symbiotic relationship.

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[33] Roventini v. Pasadena Indep. Sch. Dist., 981 F. Supp. 1013 [122 Educ. L. Rep. 998] (S.D. Tex. 1997).

[34] Burden v. Wilkes-Barre Area Sch. Dist., 16 F. Supp. 2d 569 [129 Educ. L. Rep. 1036] (M.D. Pa. 1998).

[35] Indorato v. Patton, 994 F. Supp. 300 [125 Educ. L. Rep. 473] (E.D. Pa. 1998).

Negligence

Participants

A high school football player who injured his knee during a blocking drill completed and turned in an accident report and later successfully submitted a petition permitting him to file a late notice of claim against the district. On further review, an appellate court in New York reversed in favor of the district.[16] The court reflected that the accident report neither provided the district knowledge of the specific claim nor gave it reasonable notice that an actionable wrong had been committed.

Two negligence cases, both from New York, dealt with the underlying question of the duty of care. Where an adult soccer league obtained a permit to use a high school's facilities for a tournament, it agreed to supervise the event and to prohibit intoxicating substances. Even so, a player was injured when he was kicked by an allegedly inebriated opponent. The player later challenged a trial court's dismissal of his suit against the city board of education for negligent supervision. An appellate court affirmed that the player failed to show that the board had a duty to guarantee the safety of the players from the league which was merely using its facilities.[17]

Where a student was injured in a spontaneous, pickup football game that took place in the school yard, he unsuccessfully sued the city board of education. On further review, an appellate court in New York affirmed that since the accident occurred before the start of the school day, the board did not have a duty to supervise the activity.[18]

In the first of two cases discussing unforeseeability, a school district sought further review of the denial of its motion for summary judgment in a negligent supervision suit filed by a student in New York who was injured in a collision with another player during a basketball game. An appellate court reversed in favor of the district.[19] The court explained that the injury was the result of a spontaneous and unforeseeable act committed by a student that school officials could not have anticipated.

Where an eighth-grade basketball player was intentionally kicked by a player from the opposing team, the father of the injured child sued the other player's father, the diocese, and the school boards. After a jury trial, the court entered judgment against the father and dismissed the other defendants. On further review, an appellate court in Louisiana affirmed.[40] The court agreed that since a plethora of evidence supported the defendants' version of the occurrence, employees of the diocese and board could not be held liable for the unforeseeable incident.

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[16] *In re* Baldi v. Mt. Sinai Sch. Dist., 679 N.Y.S. 2d 80 [130 Educ. L. Rep. 234] (App. Div. 1998).

[17] Krigos v. New York City Bd. of Educ., 668 N.Y.S.2d 675 [124 Educ. L. Rep. 361] (App. Div. 1998).

[18] Phillipe v. City of N.Y. Bd. of Educ., 678 N.Y.S. 2d 662 [129 Educ. L. Rep. 1136] (App. Div. 1998).

[19] Checchia v. Port Washington U.F.S.D., 678 N.Y.S.2d 367 [129 Educ. L. Rep. 748] (App. Div. 1998).

The first two of the three cases dealing with immunity arose at universities. Where a university football player committed suicide, his mother claimed that he did so because of drugs he received from the athletic department. Subsequently, the mother challenged a grant of summary judgment in her suit, alleging that the negligent, wilful, wanton and malicious acts of university employees caused her son's suicide. The Supreme Court of Arkansas reversed and remanded in favor of the mother.[41] The court was of the opinion that there were genuine issues of material fact that precluded summary judgment regarding whether the defendants were negligent in dispensing controlled drugs to players, whether the drugs contributed to or were the cause of the player's suicide, and whether the athletic director and trainer acted with such conscious indifference that malice could be inferred, thereby overriding statutory immunity.

Where a twelve-year-old boy who attended a baseball camp was injured when he was hit in the mouth by a coach swinging a bat, a trial court granted motions to dismiss based on immunity filed by the university, its head and assistant baseball coaches, and its president. On further review, the Supreme Court of Mississippi affirmed in part and reversed and remanded in part.[42] The court agreed that sovereign immunity barred the tort claims against the university and that individual defendants were entitled to qualified immunity since their acts related to the coordination and supervision of the baseball camp were discretionary. However, the court declared that a jury should consider the reasonable interpretation of the anticipatory release that the player and his father signed prior to taking part in the camp.

A student was attacked and beaten unconscious by teammates as part of an initiation ritual at his high school football team's summer camp. The injured student's father challenged a grant of summary judgment in his suit against the board of education, the principal, and the coach that alleged they were negligent in their failure to protect the student from the attack. An appellate court in Georgia affirmed that the state grants boards immunity for such discretionary acts as student safety with no actual intent to injure.[43] Further, the court was satisfied that there was no evidence that the coach or principal acted with actual malice sufficient to overcome official immunity.

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[40] Caballero v. Catholic Mutual Ins. Co., 718 So. 2d 511 [129 Educ. L. Rep. 1163] (La. Ct. App. 1998).

[41] Wallace v. Broyles, 961 S.W. 2d 712 [124 Educ. L. Rep. 739] (Ark. 1998).

[42] Quinn v. Mississippi State Univ., 720 So. 2d 843 [130 Educ. L. Rep. 1362] (Miss. 1998).

The first six of the eight cases dealing with the assumption of risk defense were from New York. The final two were litigated in California. An experienced gymnast who was injured while performing a front aerial somersault unsuccessfully alleged that he was hurt because the board of education's mats were too soft to permit a proper takeoff. An appellate court affirmed the board's motion for summary judgment.[44] The court noted that the gymnast assumed the known, apparent, and/or reasonably foreseeable risks of his sport, including a certain amount of resiliency of the mats upon which he executed his maneuvers.

A school sought further review of the denial of its motion for summary judgment in a suit filed by a field hockey player who was injured when one or more of her opponents caused her to fall and suffer an injury. An appellate court in New York reversed in favor of the board.[45] The court observed that the player assumed the clearly foreseeable risks of participation and was convinced that her lack of experience did not preclude her from assuming a risk that is so very apparent and inherent in field hockey.

When a participant was injured while playing football on a concrete schoolyard, he sought further review of a grant of summary judgment in favor of the city. An appellate court in New York affirmed that the player assumed the risks inherent in the activity of playing football on a concrete surface.[46]

In another outdoor venue in New York, a trial judge granted a school district's motion for summary judgment in a suit filed by a basketball player who was hurt when he stepped into a depression on a court. The court had a hole that was about a "foot or two" wide, a "couple of inches" deep, and at least partially covered by grass which was growing out of the asphalt. An appellate panel affirmed that assumption of risk applied since the player voluntarily chose to play on the court even though it had a faulty surface that was open and obvious.[47]

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[43] Caldwell v. Griffin Spalding County Bd. of Educ., 503 S.E.2d 43 [128 Educ. L. Rep. 904] (Ga. Ct. App. 1998).

[44] Hopkins v. City of New York, 669 N.Y.S.2d 667 [124 Educ. L. Rep. 1022] (App. Div. 1998).

[45] Sandler v. Half Hollow Hills West High Sch., 672 N.Y.S. 2d 120 [125 Educ. L. Rep. 1330] (App. Div. 1998).

[46] Riquelme v. City of New York, 674 N.Y.S.2d 111 [127 Educ. L. Rep. 394] (App. Div. 1998).

[47] Paone v. County of Suffolk, 674 N.Y.S.2d 761 [127 Educ. L. Rep. 971] (App. Div. 1998).

A high school student who was injured after he struck the unpadded portion of a wall during a basketball game sued the district, the architects of the gymnasium, and an athletic equipment company. On further review of the denial of the defendants' motion for summary judgment, an appellate court in New York reversed.[48] The court remarked that since the student played in the gymnasium for the last thirteen years and knew where the padding was located, he assumed the obvious risks inherent in playing basketball.

In another basketball scenario, a player in a youth league that was sponsored by a police association was injured when he ran into the wall behind the basket at a gymnasium owned by a school district. The player was attempting to block a shot under the basket when he ran out of bounds, hit the brick wall, and broke his ankle. After a trial court denied the district's motion for summary judgment, an appellate tribunal in New York affirmed.[49] The court ascertained that there was a triable issue of fact as to whether the dimensions of the court and the lack of padding created a dangerous condition over and above the usual dangers inherent in the sport.

Where a cheerleader was injured during practice, she unsuccessfully sued her district on the basis that she was uncomfortable doing this stunt. An appellate court in California affirmed a grant of summary judgment in favor of the district.[50] The court believed that the primary assumption of risk doctrine barred recovery because the coach's actions did not increase the risk inherent in the activity.

A middle school wrestler in California unsuccessfully sued his coach and the district after he broke his arm as the coach was demonstrating a hold. An appellate court affirmed a grant of summary judgment in favor of the defendants since the injury was an inherent risk in the sport of wrestling.[51] The court also indicated that assumption of risk was not precluded by the fact that the person who was demonstrating the technique was the wrestler's coach.

In the only case dealing with premises liability, an eighth-grade student hurt his leg while participating in a two-week spring clinic operated by varsity coaches that served to familiarize future high school football players with the team. Even though the clinics were designated as voluntary, and participants neither paid a fee nor used school equipment, a player had no hope of making the team unless he attended. A trial court entered a judgment in favor of the district when it found that there was no evidence that it failed to use reasonable care or that the condition of the field was a proximate cause of the injury. On further review, the Supreme Court of Nebraska affirmed that the student failed to prove that the condition of the practice field was the proximate cause of his injury.[52]

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[48] Davis v. Savona Cent. Sch. Dist., 675 N.Y.S.2d 269 [127 Educ. L. Rep. 995] (App. Div. 1998).

[49] Greenburg v. Peekskill City Sch. Dist., 680 N.Y.S. 2d 622 [131 Educ. L. Rep. 243] (App. Div. 1998).

[50] Aaris v. Las Virgenes Unified Sch. Dist., 75 Cal. Rptr. 2d 801 [126 Educ. L. Rep. 350] (Ct. App. 1998).

[51] Lilley v. Elk Grove Unified Sch. Dist., 80 Cal. Rptr. 2d 638 [130 Educ. L. Rep. 1297] (Ct. App. 1998).

The first of two cases dealing with recreational use statutes came from New York. A faculty-student association (FSA) of a state college challenged the denial of its motion for summary judgment in a suit filed by a student who lost an eye due to injuries he sustained while sledding on university owned property in an inner tube provided by the university. An appellate court reversed in favor of the FSA.[53] The court held that the FSA was not entitled to summary judgment on the ground of assumption of risk since the sledder raised an issue of fact whether he knew there were branches on the side of the hill. However, the court granted its motion based on the recreational use statute since the FSA neither received consideration for the use of its property for sledding nor charged a fee for doing so.

As a junior high school football coach tried to protect a player from running into a raised curb that separated the field from the surrounding running track, he was hit, and injured, by a second player. Subsequently, the coach unsuccessfully sued the school district that owned the field. On further review, an appellate court in Washington reversed and remanded in favor of the coach.[54] The court posited that since the incident occurred while the field was being used for a scheduled school football game, the district was not protected by immunity under the recreational land use statute because it was not open for public use.

The only case dealing with a playground came from New York where a third-grade student who was racing across a school playground fell against a glass window, injuring her hand and arm. Subsequently, the student's parents unsuccessfully sued the district for allegedly failing to equip the window with safety glass. An appellate court affirmed a grant of summary judgment in favor of the district.[55] The court maintained that the conclusory affidavit of the plaintiffs' expert was insufficient to show that the window did not conform to relevant safety standards or that impact-resistant glass was required for exterior windows that border outdoor play areas.

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[52] McIntosh v. Omaha Pub. Sch., 578 N.W.2d 431 [126 Educ. L. Rep. 394] (Neb. 1998).

[53] Heminway v. State Univ. of N.Y., 665 N.Y.S.2d 493 [122 Educ. L. Rep. 1050] (App. Div. 1997).

[54] Home v. North Kitsap Sch. Dist., 965 P. 2d 1112 [130 Educ. L. Rep. 297] (Wash. Ct. App. 1998).

[55] Ambrosio v. South Huntington Union Free Sch. Dist., 671 N.Y.S.2d 110 [125 Educ. L. Rep. 770] (App. Div. 1998).

In a case dealing with the applicability of respondeat superior, a driver who was injured in a car accident with an assistant baseball coach who was legally intoxicated, sued the college on the basis of vicarious liability. A federal trial court in Mississippi granted the college's motion for summary judgment.[56] The court wrote that the coach was not acting within the scope of his employment at the time of the accident because he was neither doing anything toward the accomplishment of any purpose of his job nor was he performing any act that might reasonably have been considered incidental to doing so. Rather, the court concluded that the coach was obviously a frolicking employee engaged in his own affairs.

An issue over the scope of insurance coverage developed where a child was injured while taking a swimming lesson in a pool on a college's property that was leased to a private entity. Insofar as the college was named as an additional insured on the policy of the lessee, it sought a declaration that the lessee's liability insurer had to defend and indemnify it in the suit filed on behalf of the injured child. After a trial court granted the college's motion for summary judgment, an appellate tribunal in New York affirmed that it was covered as an additional insured under the instructor's policy.[57]

In California, a former student unsuccessfully sued his high school guidance counselor and his district for negligent misrepresentation when the science course he enrolled in for the express purpose of meeting the NCAA eligibility requirements failed not only to do so but also led to the revocation of his basketball scholarship at a university. An appellate court affirmed the defendants' motion for judgment on the pleadings.[58] The court pointed out the counselor and district enjoyed statutory immunity from liability for negligent misrepresentation.

Spectators

A spectator who was injured at a school-sponsored football game when the bleachers broke under her as she was leaving unsuccessfully sued the district based on its defense pursuant to the recreational use statute. On further review, an appellate court in Wisconsin affirmed in favor of the district.[59] The court rejected the spectator's argument that the district should have been liable under the organized team sport activity exception to the recreational use statute. The court determined that this exception only extended to participants in organized team sports, not to spectators.

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[56] Smith v. Gardner, 998 F. Supp. 708 [126 Educ. L. Rep. 731] (S.D. Miss. 1998).

[57] Catchpole v. United States Underwriters Ins. Co., 674 N.Y.S.2d 50 [127 Educ. L. Rep. 388] (App. Div. 1998).

[58] Brown v. Compton Unified Sch. Dist., 80 Cal. Rptr. 2d 171 [130 Educ. L. Rep. 1283] (Ct. App. 1998).

In Indiana, a pedestrian, who planned to attend a basketball game at a state university, was injured when he slipped on the ice in the parking lot outside the arena. After a lower court granted summary judgment for the university, an appellate tribunal affirmed.[60] The court asserted that for the purposes of the state tort claims act, the parking lot should be considered a public thoroughfare. The court commented that the university was immune for injuries caused by a temporary condition in the parking lot brought about by bad weather.

Employment

Ten cases involved employment issues. Two cases concerned contract disputes, two dealt with collective bargaining, and six related to discrimination in employment.

Contract Disputes

After ignoring repeated warnings about nudging or poking female elementary school students and/or snapping their bra straps during class, a tenured physical education teacher was charged with conduct unbecoming an educator and insubordination before having his contract terminated. On further review, an appellate court affirmed the teacher's dismissal.[61] The court maintained that the termination of the teacher's contract was neither arbitrary nor capricious and that the penalty was appropriate to the offense.

In Ohio, a teacher unsuccessfully alleged that a school board's failure to hire him as an assistant boys' basketball coach violated his rights under federal constitutional and state law while also subjecting him to infliction of intentional emotional distress. The teacher applied to coach the seventh grade boys' basketball team but was not hired insofar as there were concerns that he would be coaching his own son. Moreover, even though the teacher agreed to coach the eighth grade team, a noncertificated individual was hired for the position. An appellate court affirmed a grant of summary judgment in favor of the board.[62] The court decreed that hiring a noncertificated candidate did not constitute extreme and outrageous conduct necessary to support an action for intentional infliction of emotional distress since the board relied on adequate standards in judging that the teacher was not qualified for the coaching position. According to the court, the board's refusal to hire the teacher because he was unqualified did not deprive him of his liberty interest in his good name and professional reputation.

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[59] Meyer v. School Dist. of Colby, 585 N.W.2d 690 [130 Educ. L. Rep. 258 (Wis. Ct. App. 1998).

[60] Brunner v. Trustees of Purdue Univ., 702 N.E.2d 759 [130 Educ. L. Rep. 1318] (Ind. Ct. App. 1998).

[61] Forte v. Mills, 672 N.Y.S.2d 497 [126 Educ. L. Rep. 362] (App. Div. 1998).

Collective Bargaining

In Illinois, a former teacher who was also a very successful high school basketball coach alleged that his dismissal as part of a reduction-in-force (RIF) was improperly based on his criminal record. Fifteen years earlier the teacher had been charged with burglary, sexual abuse, criminal trespass and disorderly conduct but was only convicted of criminal trespass and disorderly conduct before spending a year in jail. After copies of his criminal record began to circulate in the community in which he was teaching, the board suspended him from coaching and, shortly thereafter, terminated his contract as part of a RIF. The teacher then sued the board and individual members alleging that he was dismissed for illegitimate reasons. He also sued the union for breach of the duty of fair representation. A federal trial court dismissed the claim against the union and granted the remaining defendants' motions for summary judgment. On appeal, the Seventh Circuit affirmed that since the board was not an employer under the Labor Management Relations Act, the teacher could not bring a fair representation claim against the union.[63] The court added that the teacher failed to establish a due process liberty interest based on the allegedly defamatory statements made by board members and that absent any showing that state post-deprivation remedies were lacking, he could not maintain a procedural due process claim.

Where a teacher with more than twenty years of involvement in extracurricular activities was passed over for a job as athletic director in lieu of an individual who did not have certification, a school district sought further review of a declaration that it violated its collective bargaining agreement. An appellate court in Pennsylvania affirmed in favor of the teacher.[64] The court rejected the district's argument that the staffing of the athletic director position is not arbitrable under the bargaining agreement. The court responded that insofar as the bargaining agreement grants a person with professional status the right of preference when competing with a noncertified individual for an extracurricular position, the arbitrator acted properly in exercising authority over the matter.

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[62] Katterhenrich v. Federal Hocking Local Sch. Dist. Bd. of Educ., 700 N.E.2d 626 [129 Educ. L. Rep. 776] (Ohio Ct. App. 1997).

[63] Strasburger v. Board of Educ., Hardin County Community Unit Sch. Dist. No.1, 143 F. 3d 351 [126 Educ. L. Rep. 577] (7th Cir. 1998).

[64] Cranberry Area Sch. Dist. v. Cranberry Educ. Ass'n, 713 A. 2d 726 [127 Educ. L. Rep. 923] (Pa. Commw. Ct. 1998).

Discrimination

Gender

A female basketball coach in Texas who was involved in title IX complaints against her university unsuccessfully sued it for retaliation under titles VII and IX, section 1983, and the Equal Pay Act (EPA) when she was denied a promotion to Athletic Coordinator. On further review, the Fifth Circuit reversed in acknowledging that the coach stated a private cause of action for retaliation under title IX and that the trial court abused its discretion in denying her motion to add other claims. On remand, the trial court granted the university's motion for summary judgment as to the due process and state common law claims.[65] However, the court denied the university's motion for summary judgment on the title VII and title IX retaliation claims and the EPA charge. The court ruled that the coach's removal from the position of women's athletic coordinator was an adverse employment action under title VII. In addition, the court believed that there were material questions of fact that precluded summary judgment on the EPA and title IX claims.

In New York, a former women's basketball coach and women's sports administrator sued her former employer, a public university, for gender discrimination and retaliation in violation of title VII and the EPA. The coach alleged that although she performed essentially the same responsibilities as her male counterparts, she earned less pay. A federal jury found the university violated title VII by engaging in intentional discrimination and awarded the coach $85,000 in compensatory damages along with liquidated damages.[66] At the same time, the court rejected the university's post-verdict motion for judgment as a matter of law and challenging the damage awards. The court also upheld the compensatory damage award and the liquidated damage award of $134,829 as back pay in agreeing that the evidence supported the verdict that the university wilfully violated the EPA.

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[65] Lowrey v. Texas A & M Univ. Sys., 11 F. Supp. 2d 895 [129 Educ. L. Rep. 122] (S.D. Tex. 1998).

[66] Perdue v. City Univ. of N.Y., 13 F. Supp. 2d 326 [129 Educ. L. Rep. 267] (E.D.N.Y. 1998).

Age

A former assistant football coach at a university in Indiana prevailed in a federal jury trial against his former employer under the Age Discrimination in Employment Act (ADEA).[67] The sixty-four-year-old assistant, who coached for eight years, was not offered a new contract after the head coach allegedly said that the plaintiff "could only coach one or two more years" and that his age prevented him from putting in the long hours that were necessary. The jury awarded back pay and liquidated damages for the assistant coach. The court rejected the assistant's request for reinstatement as an inappropriate remedy but awarded him two years of front pay.

Disability

An applicant for a middle school physical education teaching position who was hearing impaired unsuccessfully sued the district for discrimination under the state Human Rights Act when another candidate was hired. Even though the job included coaching duties in football, basketball, wrestling, and track, the applicant did not want to coach any of these sports. In addition, the individual who was hired had a higher grade point average, was a physical education major, wanted to coach the sports that were listed as part of the position, recently student taught at the school, and received excellent recommendations. On further review, the Supreme Court of North Dakota affirmed a dismissal in favor of the district.[68] The court was satisfied that the evidence supported the finding that the district's decision not to hire the applicant was motivated by legitimate, nondiscriminatory reasons.

In Michigan, a long-standing dispute with his school board led a physical education, mathematics, and study skill class teacher to sue the board and the superintendent under the ADA. The superintendent asked a psychologist for an informal assessment of the teacher's fitness when he became increasingly disruptive and sullen in his dealings with the administration and other faculty after losing a grievance over not being selected for a coaching position. When the psychologist reported that the teacher appeared to be struggling with a possible psychiatric disorder that warranted further investigation, the superintendent suspended him with pay to have a physical and mental examination. The board eventually discharged the teacher for poor professional judgment and insubordination. A federal trial court in Michigan granted the defendants' motion for summary judgment.[69] The court observed that the administrators' expressions of concern for the teacher's mental health were an insufficient basis to believe that either administrator perceived him as disabled under the ADA. Further, the court was of the opinion that there was enough evidence of the teacher's misconduct to show a legitimate, nondiscriminatory reason for his dismissal.

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[67] Moore v. University of Notre Dame, 22 F. Supp. 2d 896 [130 Educ. L. Rep. 783] (N.D. Ind. 1998).

[68] Zimmerman v. Minot Pub. Sch. Dist. No.1, 574 N.W.2d 797 [124 Educ. L. Rep. 400] (N.D. 1998).

A physical education professor whose contract was terminated sued her college alleging that her dismissal violated the ADA. As a result of being in a car accident, the professor suffered serious injuries that substantially limited her abilities in walking, standing, sitting, reaching and lifting. After taking a lengthy medical leave, the professor wished to return to work but was dismissed because the college considered her unable to perform her duties even though most of her responsibilities involved lecture, rather than physical activity, classes. A federal jury in New York awarded the professor $225,000 in compensatory damages, $150,000 in punitive damages, and ordered her reinstatement. The court also rejected the college's motions for judgment as a matter of law or for a new trial.[70] The court remarked that the evidence supported a finding of disability, that the college perceived the professor as disabled, dismissed her on that basis, and that it acted with reckless indifference sufficient to warrant an award of punitive damages under the ADA.

Miscellaneous

Zoning

A religious school in Missouri challenged the denial of its request for a permit to erect lights on its soccer field. An appellate court affirmed that since the school was not a church, it was not exempt from municipal zoning ordinances.[71]

In Pennsylvania, a school district sought further review of a township zoning board's denial of its application to expand a previously approved special exception that would have permitted it to use a high school athletic field for non-school games. An appellate court affirmed that it is appropriate to require districts to yield to local zoning regulations and that it had to abide by the limitation to use the field for only school-related activities.[72]

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[69] Sullivan v. River Valley Sch. Dist., 20 F. Supp. 2d 1120 [130 Educ. L. Rep. 653] (W.D. Mich. 1998).

[70] Meling v. St. Francis College, 3 F. Supp. 2d 267 [127 Educ. L. Rep. 177] (E.D. N.Y. 1998).

[71] Chaminade College Preparatory v. City of Creve Coeur, 956 S.W. 2d 440 [122 Educ. L. Rep. 1066] (Mo. Ct. App. 1997).

[72] Hazleton Area Sch. Dist. v. Zoning Hearing Bd. of Hazle Township, 720 A. 2d 220 [130 Educ. L. Rep. 839] (Pa. Commw. Ct. 1998).

Workers' Compensation

In Oklahoma, a teacher-coach sought a workers' compensation award after he was injured in a basketball game that served as a fund raiser for the school's basketball program. The Worker's Compensation Court determined that the teacher's injury did not arise out of and in the course of his employment and denied his request for benefits. On further review, an appellate court vacated and remanded.[73] The court explained that since the school received a direct benefit from the teacher's participation in the game, he was entitled to workers' compensation benefits.

Open Records Act

A newspaper in Indiana repeatedly made unsuccessful requests to a state university to produce documents, including the compliance log kept by a member of the athletic department about information on activities related to NCAA or Big Ten rules and regulations. The university refused to provide the log based on its contention that it was covered by the diary exception to the state Access to Public Records Act. When a trial court denied the newspaper's complaint, it sought further review. An appellate court affirmed that the compliance log was exempt from disclosure under the diary exception.[74] Additionally, the court stated that follow-up documents were exempt from disclosure under the Act's exception for inter-or intra-advisory or deliberative material that is either an expression of opinion or speculative and that is communicated for decision-making.

Real Property

In Colorado, a state university unsuccessfully sought to enjoin a private stable that offered horseback tours in a national park from trespassing by creating trails across its property. Lower courts ruled that a trespass could not have occurred because the trails were a public highway and that the alleged trespassers' counterclaim for an unjust injunction was without merit. On further appeal, the Supreme Court of Colorado affirmed that the state university was not a person that could be sued in a section 1983 civil rights action.[75]

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[73] Dozier v. Mid-Del Sch. Sys., 959 P. 2d 504 [127 Educ. L. Rep. 1088] (Okla. Ct. App. 1998).

[74] Journal Gazette v. Board of Trustees of Purdue Univ., 698 N.E.2d 826 [128 Educ. L. Rep. 843] (Ind. Ct. App. 1998).

[75] Graham v. State, 956 P. 2d 556 [126 Educ. L. Rep. 460] (Colo. 1998).

Broadcast Rights

In Oklahoma, a corporation that wanted to air a radio broadcast of a high school football game unsuccessfully sought to enjoin the district from collecting a broadcast rights fee. In response to the corporation's argument that such a fee infringed upon its First Amendment rights, an appellate court affirmed that different media may be treated differentially since the school is acting in a proprietary, rather than a governmental, manner.[76] The court added that districts have the implied power to charge and collect broadcast rights fees for high school athletic events.

Conclusion

Sports in schools continues to be a source for litigation. A trend worth keeping an eye on is employment litigation related to civil rights issues, including the use of title IX in suits alleging retaliation against coaches who file title IX complaints. Cases related to the sexual abuse of students and athletes also bear watching.

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[76] Oklahoma Sports Properties v. Independent Sch. Dist. #11 of Tulsa County, Okla., 957 P. 2d 137 [126 Educ. L. Rep. 486] (Okla. Ct. App. 1998).

8
HIGHER EDUCATION

F. King Alexander
Paul W. Thurston[1]

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[1] Several graduate students assisted in the production of this chapter. Research assistants Peter Trotter and Melodie Stowasser briefed cases and assisted with numerous tasks. Students in our higher education law class, Kaamilyah Abdullah, Craig Benson, Abbie Broga, Kimberly Clark, Dana Edwards, Bart Haton, Stacey Kielbasa, Tiffany Puckett, Paul Pyrz, Santanu Rahman, Sarah Ross, David Stovall, Dee Dee Williams and Kathy Young, also briefed several cases. Still, the authors are responsible for content and organization of the chapter.

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Introduction

When recently asked if the fictional literary figure Horatio Alger still exists in the United States, *The Economist* observed that "Horatio does exist, but he has to go to college first." This statement reflects how higher education has evolved into the primary vehicle to economic stability for citizens of all ages. Consequently, as colleges and universities have steadily expanded to meet increasing individual and social demands, it is not surprising that the clash of ideas on campuses has generated a significant amount of conflict and judicial resolution. In *loco parentis* vs. individual rights, institutional autonomy vs. constitutional and statutory mandates, and the clarification of evolving principles of federalism are just a few of the competing ideas that recurrently surface in disputes involving higher education. The volume of litigation alone is one measure of the unsettled nature of the law in this area. The two Supreme Court cases that were decided this year, and the third for which it granted *certiorari*, provide another measure of the significance of the disagreements that exist. Still, much of the case law reported in this chapter is important not because of new legal standards being enunciated but rather due to the variety of factual situations that arise in postsecondary educational institutions and how legal standards are applied to these disputes. Many of the issues that the courts have addressed in recent years have resulted in substantial changes in higher education policy and practice. Affirmative action, student fees, tenure, academic freedom, Eleventh

Amendment immunity, and tax exemptions are just a few of the highly contentious issues where the courts have influenced institutional policy.

This chapter reviews more than 200 cases and is organized around the broad topics of intergovernmental relations, employees, tort liability, and contract liability. The authors have attempted to place individual cases in topical areas where the most significant issue takes precedence. This is often difficult because of numerous causes of action pled in many cases. Litigation specifically involving student issues is primarily addressed in Chapter 9; however, some cases involving students are reported in this chapter when significant federal issues are litigated or when tort liability is at issue. Brief introductions to the various sections are provided to help orient the reader to the numerous areas of higher education law.

Finally, the case law presented in this chapter elucidates many issues and challenges confronting higher education as institutions attempt to balance increasing societal demands with institutional needs. The volume of case law reviewed in this section reflects the amount of legal activity that has affected higher education in recent years. Even though the cases have changed, the issues are generally constant and indicate a consistent pattern of litigation that is likely to have an impact on administrators, faculty, and students for many years to come.

Intergovernmental Relationships

Authority to act can be granted in a variety of ways to a diverse group of actors. Disputes often involve questions regarding legal authority and whether individuals act within the scope of their authority. The first part of this section reports on cases involving the scope and limitations of legislative, state, board, and agency authority.

Legislative Authority

Two cases directly dealt with collective bargaining legislation while a series of additional suits challenged legislative authority on differing grounds. In South Dakota, a state legislature passed a bill granting the Board of Regents (BOR) sole power over the distribution of salary increases after a collective bargaining dispute surfaced between faculty and the BOR, the professors claimed that the bill violated the state constitution and filed suit. The Supreme Court of South Dakota affirmed that the legislature had authority to bestow salary control to the BOR.[2] The court asserted that the new statute was not substantially different from previous laws which required the BOR to provide three percent across-the-board salary increases.

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[2] South Dakota Educ. Ass'n. v. Barnett, 582 N.W.2d 386 [128 Educ. L. Rep. 350] (S.D. 1998).

A second collective bargaining cases involved a BOR who sought to exclude the labor-management policy from the Public Employees Bargaining Act based on the claim that the law infringed on its constitutionally autonomy to govern the university. The Supreme Court of New Mexico affirmed that the BOR's labor-management policy was invalid because it sought to preclude faculty, administrators, supervisors, professional, and technical personnel benefitting from collective bargaining.[3] The court asserted that employee rights to bargain did not impair the BOR's authority to set educational policy.

Where a state senate adjourned before confirming a governor's nominee to a board of trustees, the latter claimed that the appointment was invalid by force of law because the failure to confirm constituted an "adverse action" under state law. In reversing, the Supreme Court of Alabama held that a trial court misconstrued the language of the law when it interpreted the legislative adjournment without a vote on the appointment as an adverse action.[4] The court added that the senate's mere inaction could not undo a gubernatorial act since the appointment had already been approved by the Standing Committee on Confirmations.

A business challenged the statutory authority and constitutionality of a law that permitted a state university to rent facilities and offer catering services to private citizens. The business claimed that the law was unconstitutional because of the improper delegation of legislative authority to an administrative agency and because taxes were being used for non-public purposes. The Supreme Court of Montana affirmed that the policy underlying the statute, namely to increase revenues available for debt service on capital costs, was constitutional.[5] In addition, the panel adopted the United States Supreme Court's standard that limitations on legislative delegation of authority are less stringent where the entity exercising the delegated authority enjoys independent status over the subject matter. Finally, the court rejected the plaintiff's claim that taxes were being used for private gain since the revenues paid public debt obligations.

In New York an individual filed suit to prevent a college that was organized under the Not-For-Profit-Corporation Law (NPCL) from liquidating real property that was formerly part of its campus. An appellate court affirmed the school's authority to enter into the transaction for two reasons.[6] First, the court pointed out that the individual who challenged the exchange lacked standing because he was not a trustee, director, or officer of the college. Second, the court acknowledged that the college satisfied the two-pronged test established for NPCL transactions as terms of the sale were reasonable and promoted the interests of the school by allowing for payment of accumulated debts.

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[3] Regents of the Univ. of N.M. v. New Mexico Fed'n of Teachers, 962 P.2d 96 [129 Educ. L. Rep. 468] (N.M. 1998).

[4] Watkins v. Board of Trustees of Ala. State Univ., 703 So. 2d 335 [122 Educ. L. Rep. 1316] (Ala. 1997).

[5] Duck Inn v. Montana State Univ., 949 P.2d 1179 [123 Educ. L. Rep. 351] (Mont. 1997).

[6] Friends World College v. Nicklin, 671 N.Y.S.2d 489 [125 Educ. L. Rep. 782] (App. Div. 1998).

In an unsual case, the city of Chicago sued a public university to collect parking, amusement, and telecommunications taxes. In reversing an earlier judgment in favor of the city, an appellate court observed that sovereign immunity was inapplicable because the city's charge did not claim a present cause of action.[7] Moreover, the court commented that the enabling statute creating the university's Board of Trustees allows an exception for sovereign immunity in non-tort actions not covered by the Court of Claims Act. At the same time, the court decreed that the city did not have authority over state-operated educational institutions and that any attempt by a home rule municipality to impose fiscal burdens is unauthorized unless state approval is granted. Therefore, according to the court, the city lacked the authority to force the university to collect and remit the amusement and parking taxes. However, state law specifically allows the city to require the Board of Trustees to collect and remit municipal telecommunications taxes and the court could enforce this prerogative of the city.

A taxpayer in New York sued a university hospital and two debt collection agencies claiming they violated the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Billing Act (FCBA). The plaintiff charged that the hospital placed derogatory information in his credit report and the collection agencies neither ascertained the validity of the debts nor acted to remove them from his file. Interpreting the statute to mean that Congress did not consider hospitals to be creditors under the FCBA, a federal district court dismissed this part of the suit.[8] The court did permit the action against the collection agencies to proceed in deciding that they were within the legislative purview of both the FDCPA and FCBA.

State Authority

After a state university entered into a rental agreement with a private realtor, the state legislature passed a law authorizing the Dormitory Authority to relocate portions of the school. After the institution attempted to relocate some their facilities, a realtor charged the state, governor, university, and Dormitory Authority with violating the Contract Clause. A federal trial court dismissed all charges against the defendants except for the Dormitory Authority because it was not an arm of the State of New York.[9] As such, the court was satisfied that the contract remained enforceable because the statute violated the Contract Clause. In enjoining the Dormitory Authority from terminating payments to the realtor, the court reflected that the statute was invalid because rather than being based on the state's lack of funds, the legislature allowed the university conveniently to escape its legitimate contractual obligations.

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[7] Chicago v. Board of Trustees of the Univ. of Ill., 689 N.E.2d 125 [123 Educ. L. Rep. 801] (Ill. App. Ct. 1997).

[8] Finnegan v. University of Rochester Med. Ctr., 21 F. Supp.2d 223 [130 Educ. L. Rep. 693] (W.D.N.Y. 1998).

Students at a community college in New York sued the City and City University for raising tuition above the statutorily authorized level. An appellate court declared that the university was not an agency of the state when issues involving community college funding were challenged.[10] The court also offered that the students were not the prevailing party under the statute because they did not demonstrate that the university's position was unjustified.

Agency Authority

A private not-for-profit teaching hospital sought judicial review of an adjudication of a state agency that there was insufficient documentation to demonstrate that graduate medical education payments to a university hospital in Vermont and its faculty should be reimbursed under Medicare. In sustaining the agency's action, the federal trial court stated that the hospital needed to provide better documentation to support its request for reimbursement.[11]

The Louisiana State Board denied a student an opportunity to enter the clinical phase of his studies because of previous alcohol abuse. He challenged the decision and an appellate court vacated in his favor.[12] The court wrote that the board exceeded its authority because even though it has legal authority to deny, revoke, or suspend any license to practice as a registered nurse or otherwise discipline a licensee, it could not exercise power over an individual who has not already obtained a license to practice.

After the Commissioner of Social Security assessed the state of Minnesota for unpaid social security contributions attributable to stipends paid to residents enrolled in graduate medical education programs at a public university, the state challenged the decision. The Eighth Circuit affirmed a grant of summary judgment in favor of the state on two alternate grounds.[13] First, the court explained that the residents were not university employees under the guidelines of the 1958 social security administration agreement with Minnesota. Second, the court analyzed the nature of the residents' relationship with the university and found that since they were students, they were exempt pursuant to the 1958 agreement.

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[9] TM Park Ave. Assocs. v. Pataki, 986 F. Supp. 96 [123 Educ. L. Rep. 1159] (N.D.N.Y. 1997).

[10] Apollon v. Giuliani, 675 N.Y.S.2d 38 [127 Educ. L. Rep. 985] (App. Div.1998).

[11] Fletcher Allen Health Care v. Shalala, 22 F. Supp.2d 313 [130 Educ. L. Rep. 767] (D. Vt. 1998).

[12] Hemphill v. Louisiana State Bd. of Nursing, 713 So. 2d 1265 [128 Educ. L. Rep. 519] (La. Ct. App. 1998).

A faculty union sued a congressionally created control board for exceeding its authority by allowing the repudiation of a collective bargaining agreement between it and the university. The Circuit Court for the District of Columbia agreed that the statute creating the control board granted the federal trial court jurisdiction over the matter.[14] Moreover, the court was convinced that the board exceeded its authority in permitting the university to repudiate the agreement.

License

A group of small businesses challenged a university's involvement where the Department of Licenses and Inspections ordered them to foreclose their operations. In agreeing that the university's action went well beyond the Noerr-Penington Doctrine which allows individuals and institutions to petition the government for specific purposes, a federal trial court in Pennsylvannia precluded the university from claiming immunity from judicial review.[15]

Accreditation

In a claim over accrediting jurisdiction, a company that offered secondary school remediation courses filed suit against the Alaska Commision of Postsecondary Education when their application for a renewal certificate was denied. While the Commission had a long history of accrediting similar institutions in the past, it refused to do so on the basis that the company was not within its jurisdiction and did not offer post-secondary education courses. The Supreme Court of Alaska affirmed that the company did not fall within the Commission's jurisdiction.[16] The court reasoned that the purpose of regulating higher education is to prevent schools from granting false or misleading credentials and to limit this classification to institutions that offered courses in post-secondary education.

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[13] Minnesota v. Apfel, 151 F.3d 742 [128 Educ. L. Rep. 643] (8th Cir. 1998).

[14] University of the D. C. Faculty Ass'n/NEA v. District of Columbia Fin. Responsibility and Management Assistance Auth., 163 F.3d 616 [131 Educ. L. Rep. 583] (D.C. Cir. 1998).

[15] We v. Philadephia Dep't. of Licenses and Inspections, 983 F. Supp. 637 [123 Educ. L. Rep. 116] (E.D. Pa. 1997).

[16] Human Resources Co. v. Alaska Comm'n on Post-Secondary Educ. 946 P.2d 441 [122 Educ. L. Rep. 317] (Alaska 1997).

Sunshine Laws

The following cases relied on state open meetings laws to challenge the legality of board actions that took place in closed sessions. A board member sued the Board of Regents of the state university for violating the Open Meetings Act because members communicated with one another on matters of public concern through e-mail. The Supreme Court of Nevada affirmed that the board as a whole violated the open meetings statute by conducting public business via e-mail.[17]

The applicability of the California Open Meetings Statute was at issue when an employee of a community college who was recommended for dismissal by the president sought an open meeting with the Board of Trustees. The employee unsuccessfully argued that her right to due process was violated when she was not allowed to attend a closed session of the Board of Trustees at which the president recommended her dismissal. An appellate court dismissed the claim, ascertaining that a staff member cannot call an open session to consider employment, appointment, evaluation of performance, discipline, or dismissal.[18]

A student newspaper requested access to a committee meeting of administrators, faculty, and students that had the power to review proposed budgets, allocate student activity fees, and authorize disbursements. An appellate court agreed with the committee that in addition to its independent status from the university, it had the responsibility to oversee funds from voluntary student activities fees that were segregated from the school's general revenues.[19] Subsequently, the Court of Appeals of New York reversed in positing that since the committee is a public body, it was subject to the Open Meetings Law.[20]

Where a board of Regents sought a declaration that the proceedings of an athletic board meeting at which there was a discussion of eliminating two athletic programs were not subject to the Open Meetings Act, a state attorney filed a counter complaint. On further review, an appellate court in Illinois affirmed that the board was bound by Open Meeting and Freedom of Information Acts because it was directly funded with public resources.[21] The court ,also remanded the case for the issuance of an injunction to prevent the board from future violations of the Act.

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[17] Del Papa v. Board of Regents of Univ. and Community College Sys. of Nev., 956 P.2d 770 [126 Educ. L. Rep. 471] (Nev. 1998).

[18] Furtado v. Sierra Community College, 80 Cal. Rptr.2d 589 [130 Educ. L. Rep. 1291] (Ct. App. 1998).

[19] Smith v. City Univ. of N. Y., 661 N.Y.S.2d 599 [120 Educ. L. Rep. 776] (App. Div.1997).

[20] Smith v. City Univ. of N. Y., 685 N.Y.S.2d 910 [133 Educ. L. Rep. 559] (1999).

[21] Board of Regents of Regency Univ. Sys. v. Reynard, 686 N.E.2d 1222 [122 Educ. L. Rep. 752] (Ill. App. Ct. 1997).

An appellate court in North Carolina affirmed that a student disciplinary board, although subject to the Open Meetings Act, was bound to close its proceedings under the Family Educational Rights and Privacy Act (FERPA).[22] As such, the court denied a student newspaper's request for entry to a disciplinary hearing.

In a case involving the privacy of faculty and administrators, an appellate court in Indiana denied a newspaper's request to view the contents of a compliance log of an administrator that contained information of athletic violations by the university. The university argued the under the Access to Public Records Act, the log, although used in the deliberations of a public body, should be declared a diary or journal. The court was of the opinion that since the compliance log could be considered a diary or journal, it was exempt under the Act.[23]

Freedom of Information

A student newspaper sued a university to release information about parking violations by the basketball coach and players. An appellate court in Maryland ordered the information to be released because it did not qualify as statutory exemption relating to personnel or university financial records and there were no public policy concerns about invasion of privacy.[24] Further, the court remarked that since the information did not constitute educational records protected by FERPA, it was not protected by a similar state statute.

When a university in New York denied access to hospital records concerning animal research, the court of appeals determined that the files were subject to disclosure under the state Freedom of Information Law.[25] In so doing, the court reinstated an earlier judgment that directed the university to produce the documents even though they were maintained in compliance with the Animal Welfare Act.

Taxation

In what appears to be a growing area of litigation, three cases involving property tax exemptions were before the courts in 1998. In an important case for private institutions, a city challenged a judgment that properties owned by a private liberal arts college did not quality for a real estate tax exemption. On further review, the Supreme Court of Pennsylvania reversed and on the basis that the college was a purely public charity, entitling it to a statutory exemption from real estate taxation.[26]

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[22] DTH Publ'g. Corp. v. The Univ. of N.C. at Chapel Hill, 496 S.E.2d 8 [123 Educ. L. Rep. 1301] (N.C. Ct. App. 1998).

[23] Journal Gazette v. Board of Trustees of Purdue Univ., 698 N.E.2d 826 [128 Educ. L. Rep. 843] (Ind. Ct. App. 1998).

[24] Kirwan v. The Diamondback, 721 A.2d 196 [131 Educ. L. Rep. 451] (Md. 1998).

[25] Citizens for Alternatives to Animal Labs. v. Board of Trustees of the State Univ. of N.Y., 681 N.Y.S.2d 205 [131 Educ. L. Rep. 463] (1998).

The Cleveland Board of Education appealed a decision of the Board of Tax Appeals (BTA) that an office building owned by a university was tax exempt because it was leased to two nonprofit corporations. The university also disputed the denial of its request for an exemption for an attached garage. The Supreme Court of Ohio affirmed that the tax exemption for the space occupied by the nonprofit corporations was reasonable and that the BTA's denial for the garage was within its purview.[27]

In Texas, an appellate court reversed a partial tax exemption that had been granted to property partially leased to a public university by a nonprofit foundation.[28] The foundation sought the exemption for a building and parking lot that were scheduled to become university property at the expiration of the lease. The court maintained that the foundation was not entitled to the exemption because the property was not dedicated exclusively for public use.

Jurisdiction

Before filing suit, a party must ensure that a court has the authority to hear a dispute. A court's authority to hear a case is based either on the subject matter of the suit (subject matter jurisdiction) or the relevance that the parties have to the state in which they seek to bring the action (personal jurisdiction). Similarly, when a party files suit in federal court, the dispute must involve a federal question or federal statutory provision. The following cases illustrate examples of both subject matter and personal jurisdiction as well as federal jurisdiction.

A former employee in Ohio sued her community college when her contract as director of the Associate Degree of Nursing was not renewed. A trial court dismissed the case against the college for lack of subject matter jurisdiction since it was an arm of the state. An appellate court affirmed that since the college was created by the state Board of Regents and lacked the power to sue or be sued, the case should have been filed in the Court of Claims Act.[29] Similarly, when a student brought a breach of contract claim against a city university, a trial court dismissed the claim for lack of subject matter jurisdiction. On further review, an appellate panel in New York affirmed that the Court of Claims had exclusive jurisdiction over breach of contract suits involving the university and its senior colleges.[30]

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[26] City of Wash. v. Board of Assessment Appeals of Wash. County, 704 A.2d 120 [123 Educ. L. Rep. 245] (Pa. 1997).

[27] Case W. Reserve Univ. v. Tracy, 703 N.E.2d 1240 [131 Educ. L. Rep. 491] (Ohio 1999).

[28] Hays County Appraisal Dist. v. Southwest Tex. State Univ., 973 S.W.2d 419 [128 Educ. L. Rep. 922] (Tex. Ct. App. 1998).

[29] Miller v. Wash. State Community College, 698 N.E.2d 1058 [128 Educ. L. Rep. 856] (Ohio Ct. App. 1997).

In a different jurisdictional dispute, when the American Bar Association (ABA) denied a new law school's request for accreditation, the institution unsuccessfully filed suit in the federal trial court in Massachusetts. On appeal, the First Circuit agreed that there was not enough evidence to establish personal jurisdiction against the ABA and the individual defendants named in the suit.[31]

Alumni of a college brought a breach of fiduciary duty claim against the Board of Trustees (BOT) after it amended an 1891 agreement with their organization. The amendment allowed the BOT to reseat one trustee for an additional term without the approval of the Alumni Association. The federal trial court in New Hampshire dismissed the suit for lack of an indispensable party because without naming the entire Alumni Association as party to the suit, it could not properly conduct a fair and equitable proceeding. The First Circuit affirmed the necessity of the Association's participation because it had been involved in the election of trustees under the 1891 agreement.[32]

The Seventh Circuit affirmed that it lacked jurisdiction to hear a case brought under the Uniformed Services Employment and Reemployment Rights Act.[33] A federal trial court in Indiana had previously dismissed the case based on Eleventh Amendment immunity.

Standing

When a student filed a sexual harassment claim against a professor, the university amended its faculty disciplinary process even though the charge was without merit. The university challenged a judgment in favor of the wife of the accused faculty member as she sought a declaratory judgment to invalidate the revisions in light of the school's failure to provide her with adequate notice of the changes and an opportunity to comment on them before they were adopted. An appellate court in Washington reversed in favor of the university on the ground that the wife lacked standing because she was not injured or adversely affected by the revisions.[34]

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[30] Gelin v. Lehman College, 679 N.Y.S.2d 12 [130 Educ. L. Rep. 231] (App. Div. 1998).

[31] Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 142 F.3d 26 [126 Educ. L. Rep. 34] (1st Cir. 1998).

[32] Tell v. Trustees of Dartmouth College, 145 F.3d 417 [127 Educ. L. Rep. 48] (1st Cir. 1998).

[33] Velasquez v. Frapwell, 165 F.3d 593 [131 Educ. L. Rep. 941] (7th Cir. 1999).

[34] University of Wash. v. Allan, 959 P.2d 1184 [127 Educ. L. Rep. 1103] (Wash. Ct. App. 1998).

Ownership

A medical college in New York successfully sued a former research assistant for ownership rights in a cell line and an antibody related to Alzheimer's disease. On further review, an appellate court affirmed that since the work was sufficiently directed by the university with respect to area, method, and intended result, it was entitled to ownership of the research.[35]

Federal Issues

This section reviews cases dealing with state action, Eleventh Amendment immunity, and the application of various federal statutes.

State Action

A faculty member at a medical school in New York sued his university's medical center alleging that officials violated his First, Fifth, and Fourteenth Amendment rights by subjecting him to substantial pay cuts and harassing his research efforts. A federal trial court noted that while the state was involved in some of the medical center's activities, it had nothing to do with the matter that gave rise to the professor's complaints.[36] As such, the court granted the medical center's motion for summary judgment since it was not a state actor.

Based on experiments that were conducted between 1945 and1947 on the use of radioactive iron, a group of unconsenting female subjects sued Vanderbilt University and the Rockefeller Foundation for damages under multiple federal and state laws. A federal district court in Tennessee, in modifying an earlier judgment, rejected the defendants' motion to dismiss.[37] The court concluded that the establishment of a joint fund between the state and the university to pay the director's salary, combined with the Rockefeller Foundation's authority in hiring staff for the project, created a sufficient basis for state action.

Title IX

Bylaws of the National Collegiate Athletic Association (NCAA) prohibited students from participating in athletics while enrolled in graduate programs at institutions other than their undergraduate schools. A female volleyball player who changed institutions for graduate school challenged the bylaw since she wished to continue competing in Division I athletics. The Third Circuit affirmed the dismissal of the student's complaint. Further, the court reversed in contending that the NCAA was subject to title IX because it received dues from federally funded member institutions.[38] On further review in *National Collegiate Athletic Association v. Smith*,[39] a unanimous Supreme Court vacated and remanded. The Court indicated that dues payments from institutions that receive federal funds do not subject the NCAA to title IX. The Court asserted the view that while entities that receive federal assistance are recipients, only those that benefit economically are recipients within the meaning of title IX.

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[35] Yeshiva Univ. v. Greenberg, 681 N.Y.S.2d 71 [131 Educ. L. Rep. 255] (App. Div. 1998).

[36] Tavoloni v. Mount Sinai Med. Ctr., 984 F. Supp. 196 [123 Educ. L. Rep. 195] (S.D.N.Y. 1997).

[37] Craft v. Vanderbilt Univ., 18 F. Supp.2d 786 [130 Educ. L. Rep. 171] (M.D. Tenn. 1998].

Eleventh Amendment Immunity

Federal courts continue to address whether federal legislation abrogates states' Eleventh Amendment immunity. This is an important question because Eleventh Amendment immunity is perhaps the most frequently used legal defense strategy employed by public institutions of higher learning. In considering this issue, most courts applied the *Seminole Tribe*[40] test that asks whether Congress unequivocally expressed its intent to abrogate the immunity and whether it acted pursuant to a valid exercise of power. Judicial disagreement on issues encompassing Eleventh Amendment immunity suggest that this is an unsettled area of federalism that merits the attention of the Supreme Court.

Three federal district courts addressed the issue of whether Congress abrogated sovereign immunity by enacting title IX and later amendments. A female student who was a former athlete sued a public university alleging a violation of the anti-discrimination provisions of title IX. A federal trial court in Alabama observed that since title IX is a spending clause act that is conditioned upon the states' voluntary waivers of immunity, it had no choice but to deny the university's motion for summary judgment.[41]

A female student who was permanently expelled alleged violations of title IX by the university, two professors, and a dean. In applying the *Seminole Tribe* test, a federal district court in Virginia rejected the university's motion to dismiss. The court decided that Congress enacted title IX pursuant to its spending power that conditioned the acceptance of federal funds under its auspices on a waiver of Eleventh Amendment immunity.[42]

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[38] Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180 [125 Educ. L. Rep. 32] (3rd Cir. 1998).

[39] 119 S. Ct. 924 [132 Educ. L. Rep. 33] (1999).

[40] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[41] Beasley v. Alabama State Univ., 3 F. Supp.2d 1304 [127 Educ. L. Rep. 239] (M.D. Ala. 1998).

[42] Litman v. George Mason Univ., 5 F. Supp.2d 366 [127 Educ. L. Rep. 790] (E.D. Va. 1998).

In a second Virginia case, a female student sued her university for violations of title IX in light of the way officials responded to her having been raped. After finding that Congress expressed its intent to abrogate immunity in enacting title IX, the court asserted that the relevant sections of the act could be regarded as enforcing the Equal Protection Clause that thereby supercedes state immunity.[43] The court rejected the university's motion to dismiss because it believed that the Eleventh Amendment did not immunize it from the student's claim.

Title VI, which was the statutory model for title IX, was the heart of a claim by an African-American student in Missouri who sued his university for discrimination after officials canceled his enrollment. The Eighth Circuit reversed and reinstated the student's claim on the basis that title VI claims are not abrogated by Eleventh Amendment immunity.[44]

In the first of two cases dealing with the Age Discrimination in Employment Act (ADEA), a former employee unsuccessfully sued his university. The Eighth Circuit applied the *Seminole Tribe* test in affirming a grant of summary judgment in favor of the university when it found that the ADEA did not reflect a clear intent to abrogate Eleventh Amendment immunity.[45] Furthermore, the court stated that since the ADEA exceeded Congress' Fourteenth Amendment powers, the state's immunity was not abrogated. Conversely, in a class action by employees against the public university system in Nevada, the Ninth Circuit reached the opposite result. In judging that Congress abrogated the states' immunity in amending the ADEA, the court affirmed an order that partially denied the university's motion to dismiss.[46]

The employees of a university in Maryland who worked at a branch campus in Hawaii unsuccessfully filed a complaint for damages due to personal injuries. The federal trial court granted the university's motion for summary judgment in holding that its Asian division was an arm of the state entitled to sovereign immunity.[47] The court decreed that there was no difference between the sovereign immunity of a branch campus in state and one located elsewhere.

An applicant for admission to a public medical school in New Mexico sued the university and various officials alleging that its policy of favoring long-term residents violated the Commerce Clause and her right to interstate travel. The Tenth Circuit discerned that university officials did not have Eleventh Amendment immunity from a future injunction ordering the student's admission to the medical school.[48] The court added that a narrow exception to Eleventh Amendment immunity applied because there was an ongoing violation of federal law, the student requested prospective relief, and the suit was not barred regardless of the relief that she sought.

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[43] Thorpe v. Virginia State Univ., 6 F. Supp.2d 507 [128 Educ. L. Rep. 114] (E.D. Va. 1998).

[44] Fuller v. Rayburn, 161 F.3d 516 [130 Educ. L. Rep. 1089] (8th Cir. 1998).

[45] Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 [128 Educ. L. Rep. 978] (8th Cir. 1998).

[46] Keeton v. University of Nev. Sys., 150 F.3d 1055 [128 Educ. L. Rep. 110] (9th Cir. 1998).

[47] Emberg v. University of Md. Univ. College Asian Div., 3 F. Supp.2d 1127 [127 Educ. L. Rep. 219] (D. Haw. 1998).

In Indiana, a former associate university counsel challenged the dismissal of his suit where he alleged that he was terminated, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), because of his obligations to the National Guard. The Seventh Circuit affirmed the dismissal because the USERRA claim was barred by the Eleventh Amendment.[49] According to the court, since the USERRA was enacted under Article I, it cannot abrogate sovereign immunity.

A faculty member sued her university for breach of contract, tort claims, and sexual discrimination when her employment was terminated. The federal trial court in Puerto Rico granted the university's motion to dismiss because, as an arm of the state, it was protected by the Eleventh Amendment.[50]

In Missouri, a former student challenged the Department of Education in seeking to discharge all of his federal student loan obligations. A federal trial court in Missouri decreed that the section of the Bankruptcy Code abrogating sovereign immunity was invalid.[51] Even so, the court remanded the dispute for further consideration due to the existence of undue hardship based on the estimation of the former student's future financial condition.

The last two cases involving Eleventh Amendment immunity sought remedies for alleged violations of state law. A federal trial court in New York asserted Eleventh Amendment immunity in dismissing a breach of contract claim filed by a student who claimed that she lost her athletic scholarship when the NCAA inappropriately designated her as a nonqualifier.[52] Similarly, a federal district court in Louisiana relied on Eleventh Amendment immunity in dismissing an action for false imprisonment, battery, and intentional infliction of emotional distress when an employee of a university medical center claimed that she and others were harassed by police as they came to work.[53]

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[48] Buchwald v. University of N. M. Sch. of Med., 159 F.3d 487 [130 Educ. L. Rep. 428] (10th Cir. 1998).

[49] Velasquez v. Frapwell, 160 F.3d 389 [130 Educ. L. Rep. 511] (7th Cir. 1998).

[50] Dogson v. University of P. R., 26 F. Supp.2d 341 [131 Educ. L. Rep. 165] (D. Puerto Rico 1998).

[51] *In re* Rose, 227 B.R. 518 [131 Educ. L. Rep. 221] (W.D. Mo.1998).

[52] Adams v. Kansas State Univ., 27 F. Supp.2d 469 [131 Educ. L. Rep. 381] (S.D.N.Y. 1998).

[53] Boston v. Tanner, 29 F. Supp.2d 743 [131 Educ. L. Rep. 952] (W.D. La. 1998).

False Claims Act

The first of three cases involving allegations that federal monies were fraudulently obtained or expended by institutions of higher education arose in California. The Ninth Circuit affirmed that a trial court lacked jurisdiction under the False Claims Act since the party filing suit was not a direct source of the information as was alleged.[54] As such, the court agreed that an employee of the Office of Naval Research could not file fraud charges against a university because the claims were not supported by sufficient evidence.

Students in New Jersey filed suit under the False Claims Act against a postsecondary institution for allegedly obtaining federal funds after supplying false information about a paralegal program. The federal trial court permitted one student to present evidence that she observed while attending the school as well as information that she learned based on her own investigation.[55]

Former nurse anesthetists in the District of Columbia filed suit under the False Claims Act against a university claiming that officials made false submissions to Medicare. In response to the university's motion to dismiss, the federal trial court offered that the anesthetists were justified in bringing a *qui tam* action because it did not violate the separation of powers doctrine insofar as the government retains control over the litigation even if it does not intervene.[56]

Whistleblower Protection Act

Employees of an extension service of a public university in Illinois challenged personnel actions including dismissals and reassignments in their suit against the Department of Agriculture under the Whistleblower Protection Act. The Merit Systems Protection Board acknowledged that it had jurisdiction to resolve the dispute because the plaintiffs qualified as federal employees since they were appointed and supervised by other federal workers.[57] Further, the court reflected that since the supervisor's actions were within the scope of his duties as a federal employee, the actions could be considered as taken on behalf of the Department of Agriculture. At the same time, the court commented that since it lacked jurisdiction over the status of the plaintiffs as university employees, it remanded to determine whether the institution had taken any steps against them in their capacities as staff members.

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[54] United States *ex rel.* Biddle v. Board of Trustees of the Leland Stanford Jr. Univ., 161 F.3d 533 [130 Educ. L. Rep. 1093] (9th Cir. 1998).

[55] United States *ex rel.* Haskins v. Omega Inst., 25 F.2d 510 [131 Ed. Law Rep. 113] (D.N.J. 1998).

[56] United States *ex rel.* Amin v. George Wash. Univ., 26 F. Supp.2d 162 [131 Educ. L. Rep. 133] (D.D.C. 1998).

[57] Simmons v. Department of Agric., 80 M.S.P.R. 380 [131 Ed. Law Rep. 441] (M.S.P.R. 1998).

A staff assistant in the Department of Safety Services unsuccessfully brought a whistleblower claim against a state university and numerous employees. The assistant claimed that she was subjected to retaliatory conduct because she reported incidents of wrongdoing by her co-workers. On further review, an appellate court in Pennsylvania reversed in favor of the employee in agreeing with her that she had an actionable claim.[58]

National Voter Registration Act

The National Coalition for Students with Disabilities Education and Legal Defense Fund claimed that a university that did not make registration services available to visually impaired students violated the National Voter Registration Act (NVRA). Ultimately, the Fourth Circuit reasoned that since each of Virginia's state colleges houses a publicly financed office or department specifically for the purpose of ensuring access to educational programs and activities, the issue fell within the ambit of the NVRA.[59] As such, the court explained that the term office, as used and intended by Congress, denotes a small, community-based office which aids society by increasing the number of eligible citizens who can register to vote.

Constitutional Law Decisions

Many constitutional claims challenge employment decisions and other institutional policies made by colleges and universities. This section addresses a variety of cases involving constitutional challenges to institutional authority.

First Amendment Religion

In a case from Tennessee, a faculty member filed suit against a public university for violating the Establishment Clause and his First Amendment rights by initiating a policy that allowed a moment of silent prayer at university functions including graduation exercises, faculty meetings, dedication ceremonies, and guest lectures. By applying the *Lemon*[60] test, the Sixth Circuit ruled that the university did not violate the Establishment Clause because there was no coercive pressure placed on the faculty member to participate in the prayers or moments of silence and there were no negative consequences associated with his failure to participate.[61]

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[58] Podgurski v. Pennsylvania State Univ., 722 A.2d 730 [131 Educ. L. Rep. 1043] (Pa. Super. Ct. 1998).

[59] National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Allen, 152 F.3d 283 [128 Educ. L. Rep. 960] (4th Cir. 1998).

[60] Lemon v. Kurtzman, 403 U.S. 602 (1971).

A private college appealed a grant of summary judgment in favor of the Maryland Higher Education Commission in its suit which claimed violations of its constitutional and statutory rights after it was denied state funds.[62] The Fourth Circuit vacated and remanded in favor of the college.[63] The court pointed out that summary judgment was inappropriate since there was a dispute as to the reasonable inferences drawn from facts relating to the college's sectarian status. The court remanded for further fact-finding regarding whether the college was pervasively sectarian.

Equal Protection

In the first of two cases dealing with equal protection, a local chapter of the American Association of University Professors challenged a state law that removed the faculty workload from the scope of collective bargaining. The Supreme Court of Ohio affirmed that while the statute dealt with a legitimate government interest, it was unconstitutional because it created a classification that lacked a rational relationship to a legitimate governmental interest.[64] On further review in *Central State University v. American Association of University Professors, Central State University Chapter*, the Supreme Court reversed in declaring that if a law involves neither fundamental rights nor implicates suspect classifications, it does not violate equal protection as long as there is a rational relationship between the disparity of treatment and a legitimate governmental purpose.[65] As such, the Court was satisfied that the statutory objectives, to increase the time spent by faculty in the classroom and the ensuing imposition of a faculty workload policy not subject to bargaining, was a rational step that satisfies constitutional law.

Following deregistration, a junior college sued state officials claiming that the officials violated its rights to due process and equal protection. Pursuant to the deregistration, the state instructed the junior college to return financial aid to a student because the junior college failed to meet state funding requirements for specified academic terms. A federal district trial court in New York granted the state's motion for summary judgment.[66] While the court found that deregistration did not violate equal protection because there was no actionable disparate treatment, it assigned the due process claim to a state court for further consideration.

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[61] Chaudhuri v. State of Tenn., 130 F.3d 232 [122 Educ. L. Rep. 573] (6th Cir. 1997).

[62] Columbia Union College v. Clarke, 988 F. Supp. 897 [124 Ed. Law Rep. 534] (D. Md. 1997).

[63] Columbia Union College v. Clarke, 159 F.3d 151 [130 Ed. Law Rep. 391] (4th Cir. 1998).

[64] American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ., 699 N.E.2d 463 [128 Educ. L. Rep. 1168] (Ohio 1998).

[65] 119 S. Ct. 1162 [133 Educ. L. Rep. 34] (1999) (per curiam).

First Amendment Speech

Several courts addressed significant free speech cases involving the rights of students and faculty. In 1998 and early 1999, two First Amendment cases surfaced over the long-simmering issue of whether public colleges and universities violate the free-speech rights of students by using funds from mandatory fees to support political organizations. Despite the apparent similarities in the cases, the Seventh and Ninth Circuits reached divergent results over whether the universities violated the First Amendment free speech rights of students. Consequently, the Supreme Court has agreed to review the case from the Seventh Circuit.[67]

Students in Wisconsin sued university regents alleging that the mandatory activity fee violated their First Amendment right to free speech. The university responded that the fee system was an integral part of its educational mission because it protected the diversity of student views through a democratic process. The Seventh Circuit disagreed in remarking that the university could not use mandatory student fees to finance campus groups or private organizations that engage in political and ideological activities, speech, or advocacy.[68] In relying on a germaneness standard to assess the constitutionality of the fee system, the court ascertained that a portion of the monies collected violated this measure by compelling students to endorse or to finance political or ideological views. Yet, the court did not strike down the use of student fees to support nonpolitical organizations.

In the second case, students and former students sought to enjoin a university in Oregon from allocating funds from mandatory fees to a single public interest research organization on the ground that the fee policy violated their First Amendment right to free speech. The university responded that its practice of collecting and distributing student fees is germane to its educational mission. Ruling in favor of the university, the Ninth Circuit was not convinced that the distribution of revenues to the organization in question presented a threat to the students' First Amendment rights of free speech and free association primarily because the university took steps to keep the funds from being used directly for political activities.[69] The court also stated that the activities of the public interest group were germane to the university's mission and that the distribution of funds served a legitimate governmental interest.

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[66] Interboro Institute, Inc. v. Maurer, 984 F. Supp. 119 [123 Ed. Law Rep. 171] (N.D.N.Y. 1997).

[67] *Cert. granted*, Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).

[68] Southworth v. Grebe, 151 F.3d 717 [128 Educ. L. Rep. 624] (7th Cir. 1998).

Litigation involving academic freedom raised numerous First Amendent issues. A faculty member was suspended with pay after several students complained that he changed the content of a course that was originally designed to assist teachers with various classroom tools to one which focused on issues of bias, censorship, religion, and humanism. The professor unsuccessfully challenged the university's actions based on the First and Fourteenth Amendment claims. A federal trial court in Pennsylvania granted the university's motion for summary judgment. On further review, the Third Circuit affirmed that a faculty member at a public university does not have a First Amendment right to decide what will be taught in the classroom.[70]

Professors in Texas challenged a university policy and state legislation that prohibited them and other state employees from serving as consultants or expert witnesses for parties opposing the state in judicial proceedings. The Fifth Circuit noted that the state's interest in prohibiting employee speech contrary to its interests was outweighed by their First Amendment rights to free speech.[71] The court concluded that being compensated for appearing as a consultant or expert witness did not qualify as commercial speech under the First Amendment.

In a third case involving academic freedom, the Microsoft Corporation subpoenaed notes, tapes, and transcripts of interviews conducted by two university researchers in Massachusetts which formed the basis for a book about Netscape. Microsoft was concerned that the research could have affected pending antitrust litigation with the United States Department of Justice. The First Circuit affirmed that a federal trial court correctly denied Microsoft's request for access to these research records under the First Amendment.[72] The court was of the opinion that academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists.

A commercial photographer in Florida who sought to solicit sales of his pictures unsuccessfully challenged a university that limited his access to graduation ceremonies. The photographer claimed that a state statute in Georgia that had been struck down was similar to the policies

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[69] Rounds v. Oregon State Bd. of Higher Educ., 166 F. 3d 1032 [132 Educ. L. Rep. 72] (9th Cir. 1999).

[70] Edwards v. California Univ. of Penn., 156 F.3d 488 [129 Ed. Law Rep. 622] (3rd Cir. 1998).

[71] Hoover v. Morales, 164 F.3d 221 [131 Educ. L. Rep. 652] (5th Cir. 1998).

[72] *In re* Cusumano, 162 F.3d 708 [131 Educ. L. Rep. 360] (1st Cir. 1998).

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that restricted his access to the graduation ceremonies. The Eleventh Circuit affirmed that the First Amendment does not apply to commercial photographers at university graduation ceremonies.[73]

The Ku Klux Klan sued the director of the radio station at a public university for violating its First Amendment rights when the station did not permit the Ku Klux Klan to underwrite shows. A federal trial court in Missouri maintained that since the radio station was not a public forum, it could refuse the Klan's offer to underwrite programs without violating the First Amendment.[74]

Students, faculty, and several organizations sued a public university in Massachusetts alleging violations of their First Amendment rights after a facility was closed and security guards were posted to prevent a pro-abortion organization from meeting. An appellate court reversed in rejecting the university's claim that its action was justified.[75] The court determined that the use of drastic security measures to keep people from meeting in the campus facility effectively violated the First Amendment rights of the organization.

Discrimination in Employment

Title VII

A former college secretary in Utah claimed that her rights under title VII were violated because she was sexually harassed and subjected to retaliation. The federal trial court granted the college's motion for summary judgment while a jury also rejected her retaliation claim. On appeal, the Tenth Circuit affirmed the jury decision on retaliation,[76] but reinstated the sexual harassment claim for further consideration in light of case law which reads that the only legitimate basis for the district court's grant of summary judgment was that the harassment stopped once the college was notified of the problem.

In Louisiana a former admissions officer who was not promoted and was later dismissed claimed gender discrimination and retaliation under title VII. A federal trial court stated not only that the employee failed to establish a *prima facie* case of gender discrimination but also that the university offered legitimate, non-discriminatory reasons for her dismissal in light of her inadequate job performance.[77]

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[73] Foto USA, Inc. v. Board of Regents of Univ. Sys. of Fla. 141 F.3d 1032 [125 Educ. L. Rep. 1091] (11th Cir. 1998).

[74] Knights of the Ku Klux Klan v. Bennett, 29 F. Supp.2d 576 [131 Educ. L. Rep. 755] (E.D. Mo. 1998).

[75] Reproductive Rights Network v. President of the Univ. of Mass., 699 N.E.2d 829 [128 Educ. L. Rep. 1179] (Mass. App. Ct. 1998).

[76] Gunnell v. Utah Valley State College, 152 F.3d 1253 [128 Educ. L. Rep. 991] (10th Cir. 1998).

A professor at a community college in Virginia unsuccessfully filed suit under title VII for sexual discrimination and retaliation. A federal district court rejected the professor's claim in light of the fact that there was not a sexual harassment claim in a non-discharge setting due to a public policy exception to employment at-will under state law.[78]

In Florida a maintenance employee at a university who was involuntarily transferred and subsequently dismissed unsuccessfully claimed discrimination based on national origin and retaliation under title VII. A federal district court granted the university's motion to dismiss because even though the employee had a *prima facie* case of national origin discrimination, it presented legitimate, nondiscriminatory reasons for its action.[79]

A federal district court in Ohio examined the claim of a faculty member from Iran who alleged employment discrimination based on religion and national origin in violation of title VII when he was denied tenure. The court rejected the university's motion for summary judgment in positing not only that the faculty member was reasonably qualified when compared with others who recently received tenure but also that its justification in denying his application for tenure was a pretext for discrimination.[80]

Similarly, a faculty member from Pakistan claimed discrimination on the basis of race and national origin in violation of title VII when a university in New York denied his bid for tenure. The court rejected the faculty member's request for a preliminary injunction to prevent the university from terminating his employment because he waited fifteen months before filing a motion for relief and lacked the required evidence demonstrating extraordinary circumstances of irreparable harm.[81]

A former employee sued a college under title VII for discrimination on the basis of religion, age, and retaliation after his employment was terminated. A federal trial court in Missouri dismissed the retaliation claim contending that the employee's action in conducting a survey without university approval was not a protected activity under title VII.[82] In addition, the court rejected the discrimination claim because the college qualified as a religious organization which was exempt from title VII.

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[77] Keenan v. State of La., 985 F. Supp. 658 [123 Educ. L. Rep. 709] (M.D. La. 1997).

[78] Douglas v. Dabney S. Lancaster Community College, 990 F. Supp. 447 [124 Educ. L. Rep. 906] (W.D. Va. 1997).

[79] Mora v. University of Miami, 15 F. Supp.2d 1324 [129 Educ. L. Rep. 660] (S.D. Fla. 1998).

[80] Amini v. Case W. Reserve Univ., 5 F. Supp.2d 563 [127 Educ. L. Rep. 821] (N.D. Ohio 1998).

[81] Ahmad v. Long Island Univ., 18 F. Supp.2d 245 [130 Educ. L. Rep. 137] (E.D.N.Y. 1998).

[82] Wirth v. College of the Ozarks, 26 F. Supp.2d 1185 [131 Educ. L. Rep. 197] (W.D. Mo. 1998).

After being fired, a former employee sued a private Christian college in Tennessee for religious discrimination under title VII. A federal trial court was of the view that the employee's dismissal was valid because the college was a religious institution that was exempt from title VII's prohibition against religious discrimination.[83] The court added that the college could not waive this exemption even by its statement that it was an equal opportunity employer.

An employee of a United States Army college unsuccessfully sued the Secretary of the Army under title VII for gender discrimination when she was not promoted. In granting the Secretary's motion for summary judgment, the federal trial court in Kansas discerned that the employee failed to prove discrimination by the college because she could not demonstrate that another candidate was promoted.[84] Further, the court believed that the employee was not qualified for the promotion.

The Equal Pay Act

In the first of three cases involving the Equal Pay Act (EPA), female faculty members in Illinois sought further review of their unsuccessful suit for compensatory damages which charged that their university violated both the EPA and title VII. The Seventh Circuit reversed the lower court's ruling in favor of the faculty members on the basis that the plain language of the EPA indicates congressional intent to abrogate Eleventh Amendment immunity.[85] The court also decided that the 1991 Civil Rights Act demonstrates congressional intent to create an additional remedy for damages under title VII.

In Massachusetts a former athletic coach at a private university filed suit for discriminatory practices including willful and intentional discrimination, retaliation under title IX and for violating other state statutes. The federal trial court permitted the case to proceed, rejecting the university's claim that the claims were invalid because the statute of limitations had expired.[86]

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[83] Hall v. Baptist Mem'l Health Care Corp., 27 F. Supp.2d 1029 [131 Educ. L. Rep. 385] (W.D. Tenn. 1998).

[84] Campbell v. Walker, 28 F. Supp.2d 1216 [131 Ed. Law Rep. 722] (D. Kan. 1998).

[85] Varner v. Illinois State Univ., 150 F.3d 706 [128 Educ. L. Rep. 96] (7th Cir. 1998), petition for *cert.* filed, 67 U.S.L.W. 3469 (U.S. Jan. 11, 1999) (No. 98-1117).

[86] Legoff v.Trustees of Boston Univ., 23 F. Supp. 120 [130 Educ. L. Rep. 1150] (D. Mass. 1998).

A tenured female faculty member in a medical school sued her university claiming discrimination under title IX and the EPA because she earned less than comparably qualified and experienced males even though she received a gender equity adjustment in 1993. A jury, which reached a verdict that the university willfully violated the EPA, awarded back pay, liquidated damages, attorney fees, and costs, but dismissed the title IX claim. On further review, an appellate court in Wisconsin affirmed both the dismissal of the title IX claim and the faculty member's entitlement to reasonable attorney fees. In addition, the court asserted that the university's motion to limit the professor's costs was properly denied due to evidentiary gaps in its calculation of a settlement offer.[87]

Age Discrimination in Employment

As reflected by a case in Texas, the plaintiff in age discrimination cases has the burden of establishing a *prima facie* case, after which the burden then shifts to the employer to explain the disputed action. A faculty member sought further review of a grant of summary judgment in favor of his university in an age discrimination suit over salary increases and violations of substantive due process. Insofar as the professor was unable to prove a *prima facie* case, the Fifth Circuit affirmed that he did not have enough evidence to revive his suit.[88]

A university civil service employee who was demoted sued the university under the Age Discrimination in Employment Act (ADEA). When a federal trial court in Illinois granted the university's motion for summary judgment, the employee challenged the decision. The Seventh Circuit affirmed in favor of the university because it demonstrated that the demotion was based on legitimate, non-discriminatory reasons.[89]

Where an employee of a university in Arkansas sued the state for allegedly violating the ADEA, a federal trial court denied its motion for summary judgment under a defense of sovereign immunity on the theory that Congress made the states subject to ADEA suits. On appeal, the Eighth Circuit reversed the lower's court ruling in indicating that the ADEA does not abrogate sovereign immunity.[90]

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[87] Duello v. Board of Regents of the Univ. of Wis. Sys., 583 N.W.2d 863 [128 Educ. L. Rep. 1223] (Wis. Ct. App. 1998).

[88] Ross v. University of Tex. at San Antonio, 139 F.3d 521 [125 Educ. L. Rep. 325] (5th Cir. 1998).

[89] Debs v. Northeastern Ill. Univ., 153 F.3d 390 [128 Educ. L. Rep. 1015] (7th Cir. 1998).

[90] Goss v. State of Ark., 164 F.3d 430 [131 Educ. L. Rep. 677] (8th Cir. 1999).

A federal trial court in New York held that a faculty member fell short of establishing a *prima facie* case even though he had experienced a disparity in pay and laboratory facilities due to a competitive research environment and reallocation efforts within the college. The court judged that the faculty member failed to show that he was the best qualified candidate for the benefit he sought or that the college's actions were motivated by discriminatory interests. However, the court permitted the faculty member's claim of unlawful retaliation to proceed.[91] The court was satisfied that a reasonable jury could infer that the college sought to act in a retaliatory manner.

After being denied a promotion to full professor for the fourth time, a female faculty member sued her university claiming that it violated the ADEA and title VII. A federal trial court in Ohio denied the university's motion for summary judgment since there were material issues of fact as to whether its explanation as to why the faculty member was denied the promotion could reasonably have been seen as pretextual.[92]

In a highly publicized case in Indiana, a federal trial court addressed the post-trial motions of a former university football coach who was a victim of age discrimination. While the jury awarded the coach lost wages and liquidated damages, the court rejected his request for reinstatement but did award him two years of front pay.[93]

Americans with Disabilities Act and Section 504 of the 1973 Rehabilitation Act

A tenured faculty member in Texas unsuccessfully claimed that his university violated the ADA when he was dismissed. The Fifth Circuit affirmed that the professor failed to show that his disability was the motivating factor behind his dismissal.[94]

In New York, a physical education professor sued her college alleging that her dismissal violated the ADA and state employment statutes. Even though the professor proposed accommodations that would have allowed her to continue teaching, college officials made no attempt to implement any of her requests. A federal trial court awarded the professor compensatory and punitive damages since it found that she was, in fact, disabled, the college perceived her as such, and dismissed her for that reason.[95]

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[91] Naftchi v. New York Univ., 14 F. Supp.2d 473 [129 Educ. L. Rep. 342] (S.D.N.Y. 1998).

[92] Hines v. Ohio State Univ., 3 F. Supp.2d 859 [127 Educ. L. Rep. 201] (S.D. Ohio 1998).

[93] Moore v. University of Notre Dame, 22 F. Supp.2d 896 [130 Educ. L. Rep. 783] (N.D. Ind. 1998).

[94] Newberry v. East Tex. State Univ., 161 F.3d 276 [130 Educ. L. Rep. 1083] (5th Cir. 1998).

[95] Meling v. Saint Francis College, 3 F. Supp.2d 267 [127 Educ. L. Rep. 177] (E.D.N.Y. 1998)

A case from Indiana considered whether an attorney who represented a disabled employee should have been disqualified from representing him at trial. The dispute arose in light of a provision in the ADA that requires employers to provide reasonable accommodation for staff members with disabilities including an interactive process to determine the accommodation. The university claimed that the attorney-client privilege concerning issues surrounding the interactive process was destroyed when the suit began and, as a necessary witness, the attorney had to be disqualified from representing the employee. The court held that only the objective communication between the parties during the process was relevant, not any subjective issues involving the employee's attorney. As such, the court was satisfied that the attorney-client privilege remained intact, the lawyer was not a necessary witness, and disqualification was inappropriate.[96]

Employees

Nontenured Faculty

First Amendment Speech

A nontenured faculty member sued university administrators and trustees alleging that her First Amendment rights were violated when she was denied tenure after criticizing a book written by a colleague. The faculty member also claimed that officials violated university policy by not placing a supportive colleague on her tenure committee and that although she failed to publish in refereed journals, this was never listed as a requirement in her written evaluation plan. A federal trial court in Alabama explained that the faculty member's conduct neither raised issues of public concern nor was protected by the First Amendment because she made no effort to inform the general public about the book at issue.[97]

Nonrenewal of Contract

Where the contract of a nontenured faculty was not renewed because there were concerns over the quality of her teaching, research, and collegiality, she sued the university on a number of grounds, seeking reinstatement, declaratory and injunctive relief and over $1 million in compensatory and punitive damages, damages, and attorney fees. A federal trial court in Ohio rejected most of the claims based on the institution's Eleventh Amendment immunity.[98] The court also dismissed the title VII claim due to the lack of evidence supporting a *prima facie* case of gender discrimination and the pretextual nature of the tenure denial by the university. Finally, the court rejected the faculty member's First Amendment free speech and Fourteenth Amendment due process claims because there were insufficient facts to support her charges of deprivation of liberty or protected speech.

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[96] Harter v. University of Indianapolis, 5 F. Supp.2d 657 [127 Educ. L. Rep. 827] (S.D. Ind. 1998).

[97] Williams v. Alabama State Univ., 979 F. Supp. 1406 [122 Educ. L. Rep. 644] (M.D. Ala. 1997).

A faculty member at the American University in Cairo who was denied tenure submitted a breach of contract complaint to the West Cairo Labor Relations Office. The university moved to dismiss on the ground of *forum non conveniens*. A federal trial court in New York granted the university's motion because Egyptian law was inapplicable in this dispute.[99]

In a second case from New York, a nontenured faculty member sought further review of the rejection of his breach of contract suit when his contract was not renewed. An appellate court affirmed that nothing in the faculty handbook called for his contract to be renewed and that it did not substantively limit the college's discretion when considering renewal. The court observed that while the college failed to provide the faculty member with a written evaluation of his teaching ability, this did not breach his contract since the nonrenewal was primarily based on his inability to get along with collegues.[100]

Defacto Tenure

Nontenured community college instructors sought declaratory judgments and writs of mandamus requiring the school to grant them tenure, issue contracts to them for full-time employment, and pay damages for partial dismissal. The instructors asserted that since they earned tenure by working for more than three years, they were protected from partial dismissal without notice and a hearing. The college rejected the instructors' tenure claims and reduced their teaching loads without notice and a hearing. After a lower court granted and affirmed a grant of summary judgment in favor of the college and its president, the Supreme Court of Alabama reversed and remanded.[101] The court decreed that sovereign immunity did not bar the instructors' claims and that they were entitled to tenure after three years of consecutive or nonconsecutive employment as outlined in the nonprobationary status section of the state's Fair Dismissal Act.

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[98] Stein v. Kent State Univ. Bd. of Trustees, 994 F. Supp. 898 [125 Educ. L. Rep. 637] (N.D. Ohio 1998).

[99] Younis v. Amer. Univ. in Cairo, 30 F. Supp.2d 390 [131 Educ. L. Rep. 983] (S.D.N.Y. 1998).

[100] De Simone v. Siena College, 663 N.Y.S.2d 701 [121 Educ. L. Rep. 1126] (App. Div. 1997).

[101] *Ex Parte* McLeod, 718 So. 2d 682 [130 Educ. L. Rep. 346] (Ala. 1997).

A fifty-two-year-old former assistant professor in Georgia unsuccessfully sued the board of regents and university officials claiming violations of procedural due process, breach of contract, sexual discrimination, and age discrimination when her contract was terminated after nine years. The Eleventh Circuit affirmed a grant of summary judgment in favor of the defendants.[102] The court agreed that the assistant professor's mere presence as a faculty member beyond the seven-year probationary period did not demonstrate that she was protected by tenure. The court also pointed out that the faculty member failed to show any evidence that the college awarded tenure to any one else under similar circumstances.

Non-Existence of Contract

A university refused to honor a multi-year contract that an official, who acted without the authorization of the chancellor, made to an appointee. An appellate court in Oregon commented that multi-year employment contracts made on behalf of a university by an administrative official who was not authorized to act were not binding.[103]

Breach of Contract

A faculty member sued his junior college when his employment was terminated claiming that it deprived him of his rights to equal protection and free speech and breached his contract. The federal trial court in Colorado ruled that the faculty member met the requirements for a claim that he was denied equal protection when he alleged that college officials deliberately campaigned to terminate his employment.[104] Further, the court noted that the existence of material issues of fact regarding whether the faculty member actually violated college policies precluded the motion for summary judgment.

Three former tenured faculty members filed claims for breach of contract when two institutions merged and they were not offered tenure. At issue was whether the faculty union and the university acted appropriately by extinguishing the college's tenure obligations to the faculty members. An appellate panel in Illinois affirmed that the evidence supported the trial court's finding that the college and university did not intend their affiliation to extinguish the tenure obligations of the faculty member and that prejudgment interest should not have been awarded.[105]

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[102] Gray v. Board of Regents of Univ. Sys. of Ga., 150 F.3d 1347 [128 Educ. L. Rep. 580] (11th Cir. 1998).

[103] Yasnoff v. Hallick, 963 P.2d 747 [129 Educ. L. Rep. 508] (Or. Ct. App. 1998).

[104] Vanderhurst v. Colorado Mountain College Dist., 16 F. Supp.2d 1297 [129 Educ. L. Rep. 1073] (D. Colo. 1998).

[105] Gray v. Mundelein College, 695 N.E.2d 1379 [127 Educ. L. Rep. 376] (Ill. App. Ct.1998).

Moreover, in concluding that the college was bound by the dismissal guidelines in the faculty manual, the court reinstated one of the faculty members, declaring that although she accepted a temporary nontenured position with the university, this did not waive her right to pursue a remedy.

A former assistant professor of dance in Utah challenged the nonrenewal of her one-year contract after the program director voiced concerns about her skills and teaching abilities. When the campus Academic Freedom and Tenure committee reviewed the matter, it pointed out that since the nonrenewal was discriminatory, the university should immediately rehire the professor. Even so, the president rejected the committee's recommendation and upheld the nonrenewal. After a trial court granted the university's motion for summary judgment in the professor's breach of contract action, an appellate tribunal affirmed that the university was not bound by the committee's recommendation.[106]

Dismissal During Contract Period

The Supreme Court of Mississippi affirmed that the due process rights of a non-tenure track faculty member were not violated and that university officials did not act arbitrarily or capriciously in investigating a complaint of sexual harassment.[107] The dispute arose when the faculty member allegedly fondled a student's breast while explaining a mammogram procedure to her. Following an investigation, the university issued a letter of reprimand and chose not to renew the faculty member's contract. The courts rejected the faculty member's claim that he was denied due process because insofar as he did not have tenure, he lacked a protected property interest in his job and that the university's actions did not deprive him of liberty that would have impeded him from obtaining future employment.

An instructor at a community college unsuccessfully filed suit over her dismissal in an effort to continue her employment and obtain tenure. The college responded that the instructor was a temporary hire who was dismissed due to a reevaluation of the faculty-student ratio. After a trial court granted the board's motion to dismiss because officials acted within their common-law authority, the instructor sought further review. An appellate court in Illinois affirmed that even though the instructor's dismissal was not in compliance with the review provisions of state law, the board had the inherent discretionary managerial authority under both the statute and common law to dismiss the instructor.[108]

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[106] Cherry v. Utah State Univ., 966 P.2d 866 [130 Educ. L. Rep. 906] (Utah Ct. App. 1998).

[107] Hall v. Board of Trustees of State Insts. of Higher Learning, 712 So. 2d 312 [127 Educ. L. Rep. 494] (Miss. 1998).

[108] Kerger v. Board of Trustees of the Community College Dist. No. 502, 692 N.E.2d 695 [125 Educ. L. Rep. 533] (Ill. App. Ct. 1997)

The former chair of a department in a medical school sued his university for breach of contract, violations of due process, intentional infliction of emotional distress, and defamation. The former chair alleged that his administrative appointment guaranteed him the same rights as his academic appointment. The university responded that the chair was removed from office for cause in light of his poor performance. The Ohio Court of Claims reasoned that the university's removal of the chair without notice did not breach contractual procedures and that communications made in the process were protected by qualified privilege.[109]

Denial of Tenure

The nonrenewal of contracts and denial of tenure continue to give rise to litigation. In each case, the courts remained reluctant to address the merits of tenure, preferring to leave this responsibility to academic professionals. As might be expected, suits over the denial of tenure involved many complex procedural and constitutional issues.

At issue in one case was whether a tenure-track faculty member would be reviewed for tenure based on her academic merit, as stated in the college guidelines, or whether institutional needs, such as enrollment, would be taken into account. An appellate court in New York reversed in favor of the faculty member in positing that she was entitled to a second tenure review based solely on academic merit.[110] At the same time, the court determined that the faculty member was not entitled to a grant of summary judgment since it was reluctant to intrude into the field of faculty and educational appointments.

In a second New York case, a university sought further review of an order requiring it to reconsider whether a faculty member with an insufficient record of research and publication was properly denied tenure. An appellate court reversed in favor of the university in reflecting that its denial of the faculty member's request for tenure was not arbitrary, capricious, or tainted by bad faith.[111] In addition, the court maintained that since the dean's failure to consult with the faculty member's department chair over the makeup of the tenure review committee was an insubstantial deviation from university policy, it did not justify judicial intervention.

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[109] Dodson v. Wright State Univ., 697 N.E.2d 287 [127 Educ. L. Rep. 1010] (Ohio Ct. Cl. 1997).

[110] Roufaiel v. Ithaca College, 680 N.Y.S.2d 298 [130 Educ. L. Rep. 1309] (App. Div. 1998).

[111] Loebl v. New York Univ., 680 N.Y.S.2d 495 [131 Educ. L. Rep. 237] (App. Div. 1998).

Procedural Issues

A faculty member at a medical school in Illinois sued university officials for allegedly violating his rights to due process and equal protection by constructively discharging him when he was accused of sexual harassment. The Seventh Circuit affirmed the denial of the officials' motion to dismiss.[112] The court ascertained that university officials were not entitled to qualified immunity since the faculty member sufficiently supported violations of his rights and that applicable constitutional standards were clearly established at the time.

Tenure Review Process

When a nontenured assistant professor in a business school ignored the advice of her departmental colleagues and sought tenure a year earlier than her contract called for, the president of the university authorized the early review but informed her that if her application was unsuccessful, she would not receive another review in the final year of her contract. When the professor was denied tenure, she charged the university with violating the equal protection clauses of the state and federal constitutions, engaging in title VII sex discrimination, breaching her contract, and breaching of implied covenant of good faith and fair dealing. An appellate court in Maryland reversed the jury award on the ground that the denial of tenure was appropriate, as a matter of law, and did not violate any of the assistant professor's rights.[113] The court was also convinced that the university president acted in good faith in denying the professor's application for tenure.

Title VII

An assistant professor in Mississippi sued her university for gender discrimination in violation of title VII when her application for tenure and promotion was denied. The Fifth Circuit was of the opinion that the professor's claim of discrimination that women enjoyed a lower standard for obtaining tenure and promotion was not supported by substantial evidence.[114] The court discerned that the professor's failure to meet the publishing requirements for tenure justified the university's action.

In New York a faculty member from Pakistan claimed that her university violated title VII in denying her request for tenure. A federal trial court granted the university's motion for summary judgment despite its reluctance to dispute the professor's claim of discrimination.[115] The court remarked that the professor's claim of religious and ethnic discrimination was unfounded since there were no genuine issues of material fact or direct evidence supporting her allegations.

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[112] Levenstein v. Salafsky, 164 F.3d 345 [131 Educ. L. Rep. 668] (7th Cir. 1998).

[113] University of Baltimore v. Iz, 716 A.2d 1107 [129 Educ. L. Rep. 377] (Md. Ct. Spec. App. 1998).

[114] Krystek v. University of S. Miss., 164 F.3d 251 [131 Educ. L. Rep. 660] (5th Cir. 1999).

A faculty member in New Jersey filed a title VII action against his university claiming that it discriminated against him based on gender and his Israeli national origin. The plaintiff also alleged that the university deprived him of his Fourteenth Amendment substantive due process rights by subjecting him to arbitrary and capricious deprivation of tenure and promotion. The federal trial court granted the university's motion for summary judgment in acknowledging that the faculty member was unable either to provide sufficient evidence to establish a *prima facie* case or to discredit the university's proffered reason for denying him tenure more than once.[116]

Discrimination

In the first of three cases dealing with tenure discrimination, the Circuit Court for the District of Columbia reversed a ruling that the statute of limitations barred the non-constitutional claims of a female faculty member who charged the university with racial discrimination and breach of contract.[117] However, the court affirmed the dismissal of the faculty member's Fourth and Fifth Amendment claims because she failed to provide sufficient evidence of governmental involvement in the university's tenure process.

A fifty-eight-year-old instructor in Illinois unsuccessfully sued her university under the ADEA for age discrimination when she was denied tenure and charged the institution with retaliation because she filed an Equal Employment Opportunity Commission complaint. In agreeing with the lower court decision, the Seventh Circuit refused to overrule the judgment of the faculty tenure committee that decided the instructor was unqualified.[118] In addition, the instructor was unable to prove that the university's justification was a pretext for discrimination under the ADEA.

An Arab-American faculty member sued his university and various officials for discrimination, defamation, gross negligence, and conspiracy to deprive him of equal protection when he was denied tenure. The federal trial court in Kansas granted the defendants' motion for summary judgment under Eleventh Amendment immunity.[119] In addition, the court was of the view that the faculty member failed to provide sufficient evidence regarding his claims for conspiracy to deprive him of equal protection or defamation.

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[115] Jalal v. Columbia Univ., 4 F. Supp.2d 224 [127 Educ. L. Rep. 280] (S.D.N.Y. 1998).

[116] Harel v. Rutgers, State Univ., 5 F. Supp.2d 246 [127 Educ. L. Rep. 762] (D.N.J. 1998).

[117] Harris v. Ladner, 127 F.3d 1121 [121 Educ. L. Rep. 951] (D.C. Cir. 1997).

[118] Vanasco v. National-Louis Univ., 137 F.3d 962 [124 Educ. L. Rep. 525] (7th Cir. 1998).

[119] El-Ghori v. Grimes, 23 F. Supp.2d 1259 [130 Educ. L. Rep. 1200] (D. Kan. 1998).

Tenured Faculty

Cases involving sanctions to faculty members with tenure are reviewed and presented in light of the severity of the penalty.

Disciplinary Action

A tenured faculty member who was disciplined for harassing undergraduate students unsuccessfully challenged the authority of the university to adopt its own rules and regulations for monitoring sexual harassment. An appellate court in New York affirmed the dismissal of the claim because the language of the university's Campus Code of Conduct plainly stated that it was not the exclusive means of enforcing conduct standards.[120] The court also affirmed the dismissal of the faculty member's other charges because he failed to state a claim for breach of contract or fiduciary duty, for intentional interference with economic advantage, or for violating title VII.

Indemnification

When a professor who received over $60 million in a federally funded research program was investigated for possible irregularities in the fiscal management of the grant, the university agreed to defend and indemnify him to the amount of $275,000. When the university refused to pay anything exceeding this amount until the faculty member provided itemized time records for all the legal work performed on his behalf, the professor unsuccessfully challenged its action as arbitrary. An appellate court in Minnesota affirmed the dismissal of the professor's claim based on the terms outlined in the indemnification policy.[121]

Dismissal for Cause

Contrary to public perception, tenure only grants an individual the right to due process in any action to terminate tenure and not the right to lifetime employment. Institutions have dismissed tenured faculty members for a variety of reasons including violations of contractual responsibilities, poor performances, and inappropriate behaviors. These actions have resulted in numerous claims by faculty members who have alleged violations of contractual, procedural, and constitutional rights in challenging the appropriateness of the dismissal for cause.

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[120] Maas v. Cornell Univ., 666 N.Y.S.2d 743, [123 Educ. L. Rep. 819] (App. Div. 1997).

[121] Buchwald v. University of Minnesota, 573 N.W.2d 723 [123 Educ. L. Rep. 1290] (Minn. Ct. App. 1998).

A department head in a medical school who was dismissed for excessive self-compensation and improper allocation of professional increment funds challenged the university's actions on a variety of due process grounds. The Supreme Court of South Carolina reaffirmed a lower court's ruling for dismissal.[122] However, the Court also disagreed with the earlier judgment that the faculty member had not received a constitutionally sufficient pretermination hearing because he had not been advised that the university was contemplating his dismissal.

In another case involving the adequacy of pretermination procedures used in the dismissal of a tenured faculty member, the Supreme Court of Appeals of West Virginia affirmed that a college violated a professor's due process rights by denying him an opportunity to respond to the notice of termination before he was discharged.[123] The court also reversed an earlier award of back pay in believing that nominal damages, in the form of one dollar, was a sufficient remedy.

A former tenured university faculty member appealed a grant of summary judgment in favor of the state in his action for wrongful dismissal and other claims. The Supreme Court of North Dakota affirmed that the state was entitled to have its motion granted because it dismissed the faculty member for legitimate cause.[124]

In the first of two New York cases, a faculty member unsuccessfully filed a breach of contract claim against his college when he was dismissed for malfeasance because of plagiarism in a published book. An appellate court affirmed a grant of summary judgment in favor of the college since the faculty member was unable to demonstrate that he was treated arbitrarily.[125]

A tenured faculty member sued his private college when he was dismissed for recurrent violations of its sexual harassment policy. The professor claimed that the college breached his contract and violated his rights to due process because the policy was not binding on faculty and staff due to procedural infractions associated with its adoption. An appellate court in New York affirmed a grant of summary judgment in favor of the college in agreeing that it acted appropriately and within its rights in dismissing the faculty member.[126]

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[122] Ross v. Medical Univ. of S. C., 492 S.E.2d 62 [121 Educ. L. Rep. 1174] (S.C. 1997).

[123] Barazi v. West Virginia State College, 498 S.E.2d 720 [125 Educ. L. Rep. 992] (W. Va. 1997).

[124] Messiha v. State, 583 N.W.2d 385 [128 Educ. L. Rep. 886] (N.D. 1998).

[125] Klinge v. Ithaca College, 663 N.Y.S.2d 735 [121 Educ. L. Rep. 1132] (App. Div. 1997).

[126] Holm v. Ithaca College, 682 N.Y.S.2d 295 [131 Educ. L. Rep. 823] (App. Div. 1998).

When the coordinators of a Criminal Justice Program for a community college brought their concerns about irregularities and deviations from established law and policy in the school's program to the state Department of Law Enforcement, the director threatened to fire them over their report. When, during the ensuing investigation, one of the coordinators was dismissed for budgetary reasons, he filed suit alleging that he was fired in retaliation for the report. A federal trial court in Florida rejected the college's motion to dismiss the retaliation claim in asserting that the dismissal violated the coordinators' First Amendment rights.[127]

In Colorado, a dean sought to dismiss a faculty member for harassment, misuse and/or misrepresentation of government property, conduct detrimental to the efficient and productive operation of the university, unacceptable job performance, and violations of standards of professional conduct. After a series of hearings, some of which contained procedural irregularities, a faculty committee recommended a one-year suspension for the professor. Even so, the university's board of trustees rejected the committee's recommendation and voted to dismiss the faculty member. The faculty member contested his dismissal on the ground that the university applied vague standards and violated his right to due process. An appellate court in Colorado affirmed that since none of the faculty member's rights were violated, his dismissal was appropriate.[128] The court indicated that the university met the requirements outlined in its code by dismissing the faculty member and that his due process claims either were inadequately alleged or harmless errors.

Denial of Due Process

A tenured faculty member in a law school who was dismissed for having engaged in a sexual act with one of his students claimed that the university violated his First Amendment right to free speech and Fourteenth Amendment rights to due process and equal protection. The federal district court in Kansas dismissed the First Amendment claim based on the qualified immunity of the various actors but refused to dismiss the Fourteenth Amendment claims. The Tenth Circuit reversed the lower's court's ruling in holding that all of the named defendants enjoyed qualified immunity from the alleged violations of procedural due process and equal protection. The court was satisfied that the law school provided the professor with an adequate pretermination hearing, that his right to procedural due process was not violated during an extended evidentiary hearing, and that he failed to allege a valid claim for a violation of equal protection.[129]

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[127] Harris v. District Bd. of Trustees of Polk Community College, 9 F. Supp.2d 1319 [128 Educ. L. Rep. 781] (M.D. Fla. 1998).

[128] Barham v. University of N. Colo., 964 P.2d 545 [129 Educ. L. Rep. 845] (Colo. Ct. App. 1997).

Denial of Employee Privileges

An associate professor filed an administrative grievance over his medical school's use of 1990 promotion and tenure guidelines rather than the 1981 version under which he achieved his current rank. The faculty member claimed that the university used the newer guidelines in retaliation for earlier litigation that allowed him to continue a private practice. An administrative law judge denied the grievance because the faculty member withdrew his application for promotion. The Court of Appeals of West Virginia upheld the administrative judge's decision insofar as it agreed that the associate professor had withdrawn his application.[130]

A faculty member sued various officials and the chair of a board of trustees seeking to enforce the university's salary policy. The faculty member alleged that his salary was below the minimum range approved by the university's policy. An appellate court in Alabama permitted the suit to proceed because the faculty member sought prospective relief.[131] At the same time, the court affirmed a grant of summary judgment in favor of the university in the faculty member's claim for back pay because the sovereign immunity clause leaves the court without jurisdiction for breach of contract against the state.

Dismissal for Financial Exigency

Two tenured faculty members at a community college who were terminated when their programs were eliminated due to financial difficulties filed suit for breach of contract in claiming that their contracts did not permit their dismissals. After a trial court granted the faculty members' request for relief, the college sought further review. An appellate court in Maryland reversed an earlier decision and ruled that state law permitted the dismissals of tenured faculty members when their programs are eliminated for financial exigency.[132] However, the court remanded for consideration of whether college officials used adequate procedures in selecting which tenured faculty members should be dismissed.

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[129] Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504 [130 Educ. L. Rep. 441] (10th Cir. 1998).

[130] Graf v. University of W. Va. Bd. of Trustees/ W. Va. Univ., 504 S.E.2d 654 [129 Educ. L. Rep. 858] (W. Va. 1998).

[131] Vaughan v. Sibley, 709 So. 2d 482 [125 Educ. L. Rep. 1373] (Ala. Civ. App. 1997).

[132] Board of Community College Trustees for Baltimore County - Essex Community College v. Adams, 701 A.2d 1113 [122 Educ. L. Rep. 210] (Md. Ct. Spec. App. 1997).

All Employees

Grievances

In the first of three cases involving the same parties, a community college unsuccessfully challenged an arbitration award on the ground that language in the employment contract for designating courses for qualified adjunct faculty during a mini-semester was irrational. An appellate court affirmed that the clause in the contract did not interfere with the college's obligation to maintain academic standards.[133]

When three adjunct faculty members were removed from the seniority list in their department, their union filed grievances against the college. Subsequently, an appellate court struck down a grievance award in favor of the union. At a second grievance hearing, the panel agreed with the union's argument that the college's failure to treat overload courses as adjunct courses violated public policy. On further review, an appellate court in New York rejected the college's argument that a union-designated arbitrator demonstrated partiality on behalf of the union.[134] As such, the court not only affirmed that the award was not subject to *vacatur* but also that the college's failure to treat the overload courses as adjunct courses violated public policy.

The third case involved the union's challenge to a judgment that vacated an arbitration award in favor of its adjunct faculty. The union alleged that the college's claim that the final collective bargaining agreement contained a mutual mistake was not a valid basis for rescinding the award. An appellate court in New York reversed in favor of the union.[135] The court decreed that newly discovered evidence was not a valid basis for vacating an award. The court added that since the arbitration award did not interfere with the college's nondelegable obligations, the union's petition should have been granted because the award does not violate public policy.

In the first of two cases involving challenges to dismissals under the grievance clauses of contracts, an employee of a technical college was dismissed for insubordination, falsification of time records, and excessive unexcused absences. The employee unsuccessfully filed a grievance that claimed her dismissal under the just cause provision of her bargaining agreement was invalid because it was not supported by the requisite level of proof. Yet, an arbitrator contended that the college was remiss in failing to warn the employee that her various misdeeds were sufficient to provide just cause for her dismissal. On further review, both a trial court and an appellate tribunal in Ohio agreed that the award in favor of the employee was invalid because the arbitrator exceeded his powers and acted outside the scope of the bargaining agreement.[136]

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[133] Meehan v. Nassau Community College, 674 N.Y.S.2d 697 [127 Educ. L. Rep. 956] (App. Div. 1998).

[134] Meehan v. Nassau Community College, 676 N.Y.S. 2d 178 [128 Educ. L. Rep. 811] (App. Div 1998).

[135] Meehan v. Nassau Community College, 675 N.Y.S.2d 345 [128 Educ. L. Rep. 323] (App. Div. 19978.

When an area coordinator for three dormitories failed to perform her duties consistent with university policies, she was dismissed. While a grievance board sustained the university's action in light of the evidence, a trial court ordered it to reinstate the coordinator. On further review, the Supreme Court of Appeals of West Virginia reversed in favor of the university.[137] The panel pointed out that since the trial court failed to review all the evidence, particularly the numerous acts of misconduct by the coordinator, her dismissal was justified.

Breach of Contract

Eight months after a part-time layout artist accepted a full-time position with a cooperative extension program, he was told that his contract would not be renewed because of a reduction-in-force (RIF). Yet, a grievance committee found the dismissal was not justified since the university did not follow the provisions in its employee handbook. Even so, the university president rejected the committee's recommendation based on his claim that since the layout artist was a contract employee whose term was not renewed, the handbook was irrelevant. On further review of a grant of summary judgment in favor of the university, the Supreme Court of Alabama remanded for a determination of whether the president had the authority to bind the university to a permanent employment relationship and whether the language in the handbook created a contract of continuing employment.[138] In addition, the court suggested that if the trier of fact found that there was an employment contract present, then it would have to consider whether the layout artist was denied due process when he was discharged without cause.

The Ohio Court of Claims was of the opinion that a college breached the contract of a former employee when it failed to give him ninety days' notice of non-reappointment. The court ascertained that according to university bylaws, if the predetermined date of notice of non-reappointment is missed, an employee is entitled to an additional twelve-month terminal contract. The court posited that since the former employee had a reasonable expectation of continued employment insofar as the preexisting date passed, he was entitled to a new contract.[139]

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[136] Hocking Technical College v. Hocking Technical College Educ. Ass'n., 697 N.E.2d 249 [127 Educ. L. Rep. 1003] (Ohio Ct. App. 1997).

[137] Reece v. Board of Trustees/ Marshall Univ., 502 S.E.2d 186 [127 Educ. L. Rep. 1107] (W. Va. 1998).

[138] Matthews v. Alabama Agric. & Mechanical Univ., 716 So. 2d 1272 [129 Educ. L. Rep. 539] (Ala. Civ. App. 1998).

Administration and Staff

Dismissal

When faced with dismissal, employees often turn to the courts for aid. During 1998, administrators and staff members challenged their dismissals on a variety of grounds including wrongful discharge, inadequate due process, and defamation. Even though employees have less protection than tenured faculty members, institutions must still meet standards of proof before acting.

The manager of a machine shop sought further review of a grant of summary judgment in favor of a university where he was employed. An appellate court in Kentucky affirmed that the university properly dismissed the manager since he was an at-will employee and that allegedly defamatory statements made by school officials were not actionable since they were either true or pure opinion.[140]

As illustrated by a case from Alaska, if an educational employer is using insubordination as a ground for dismissal, it must prove that an employee acted with willful insubordination in response to clear and concise directions from a supervisor. In this case, a university dismissed an employee who refused to discuss performance problems with her supervisor because they had a fractious relationship. After the employee filed two grievances, the supervisor unsuccessfully tried to discuss the workplace environment with her when she informed him that her attorney advised her not to do so. Consequently, the university discharged the employee for incompetence since her supervisors filed documentation that she was insubordinate. After a trial court sustained the employee's dismissal, the Supreme Court of Alaska reversed in her favor. The court ruled that the employee complied with every directive in as reasonable a manner as was possible under the circumstances.[141] However, despite similar fact patterns, courts in Alabama[142] and Montana[143] decided against employees who sought restitution.

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[139] Linkey v. Medical College of Ohio, 695 N.E.2d 840 [126 Educ. L. Rep. 1114] (Ohio Ct. Cl. 1997).

[140] Buchholtz v. Dugan, 977 S.W.2d 24 [130 Educ. L. Rep. 336] (Ky. Ct. App. 1998).

[141] Nyberg v. University of Alaska, 954 P.2d 1376 [125 Educ. L. Rep. 914] (Alaska 1998).

[142] Ward v. Wortham, 706 So. 2d 1238 [124 Educ. L. Rep. 1140] (Ala. Civ. App. 1997).

[143] Kulm v. Montana State Univ.- Bozeman, 948 P.2d 243[122 Educ. L. Rep. 829] (Mont. 1997).

In Illinois an employee sued his university when he received a terminal contract due to poor performance evaluations. The employee claimed that the university violated his First Amendment rights because he received a terminal contract only after he made public statements about potential fiscal improprieties in the operation of her program. A federal trial court granted the university's motion for summary judgment since the employee failed to show that his comments led to his dismissal.[144]

Faculty members at a community college sought further review of a ruling that upheld their dismissals as part of a RIF based on declining enrollment. An appellate court in Nebraska affirmed that the board acted within its authority by exercising its broad discretion in considering the factors to be used in a RIF and how they should be weighed.[145]

A security office dispatcher at a college complained that her resignation was actually a constructive discharge. However, an appellate court in Colorado discerned that the dispatcher failed to sustain her burden of proving that the college committed a constructive discharge.[146] In addition, the court stated that the dispatcher waived her right to withdraw her resignation when she agreed to make her termination effective immediately.

Due Process

As reflected by the first of three cases from Alabama, at-will employees do not have property interests in their jobs. The African-American president of a state technical college filed suit claiming that his dismissal by the board, which operated under a consent decree, was racially motivated. A federal district court upheld the dismissal since the board of the college relied on numerous violations in audit reports.[147] Similarly, a state appellate court affirmed that an employee who was dismissed was not deprived of a property interest since he had access to an adequate remedy in the form of pre- and post-termination review.[148]

A former employee at a public university sued administrators in their individual and official capacities under section 1983 based on her claim that they violated her Fourteenth Amendment right to due process for forcing her to resign without a hearing. A federal trial court in Alabama analyzed Eleventh Amendment immunity and constitutional tort standards in dismissing the suit against the administrators in their official capacities.[149] However, the court afforded the employee the opportunity to amend her complaint to show how her Fourteenth Amendment right might have been violated.

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[144] Roberts v. Broski, 979 F.Supp. 746 [122 Educ. L. Rep. 462] (N.D. Ill. 1997).

[145] Ackerman v. Metro. Community College Area, 575 N.W.2d 181 [124 Educ. L. Rep. 704] (Neb. Ct. App. 1998).

[146] Harris v. State Bd. of Agric., 968 P.2d 148 [131 Educ. L. Rep. 266] (Colo. Ct. App. 1998).

[147] Shuford v. Alabama State Bd. of Educ., 978 F. Supp. 1008 [122 Educ. L. Rep. 180] (M.D. Ala. 1997).

[148] Dunn v. Alabama Agric. and Mechanical Univ., 719 So. 2d 224 [130 Educ. L. Rep. 940] (Ala. Civ. App. 1998).

In New York a former employee of a university who was dismissed for failing to provide appropriate visa documentation discovered that there were limits to her right to due process. The worker claimed that the dean sexually harassed her, deprived her of gainful employment, and conspired with other university officials to deny her access to her job as well as to her entitlement under the retirement system. A federal trial court rejected most of the plaintiff's claims because she did not file suit in a timely fashion.[150] Even so, the court permitted the former employee's claim that she was denied her property interest in continued employment due to harassment and retaliation at the hands of a supervisor to proceed.

Discrimination

An employee of a state university library in Mississippi who unsuccessfully applied for a job as a legal writing specialist filed suit alleging age discrimination. After the employee applied for a similar position but was not hired, she amended her original complaint to include a retaliation claim in response to her having filed the age discrimination claim. When a jury entered a verdict in favor of the employee on the age discrimination claim and for the university on the retaliation charge, both sides appealed. The Fifth Circuit reversed in favor of the university on the age discrimination claim.[151] The court maintained that the employee failed to establish that the university's reason for hiring a younger applicant was a pretext for age discrimination since the evidence did not establish that she was clearly better qualified than the younger candidate.

Retaliation

A former Director of Student Services who lost her job as part of downsizing sued her university for discrimination when she was not hired as Dean of Students. The former employee also claimed that she was entitled to an additional three months of severance pay that was withheld because of her discrimination suit. When the federal trial court in the District of Columbia granted the university's motion for summary judgment, the former employee appealed. The Circuit Court affirmed that there was no discrimination but reversed in declaring that a jury might find that the university retaliated against the employee by withholding her severance pay.[152]

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[149] Helton v. Hawkins, 12 F. Supp.2d 1276 [129 Educ. L. Rep. 249] (M.D. Ala. 1998).

[150] Burrell v. City Univ. of N.Y., 995 F. Supp. 398 [125 Educ. L. Rep. 1098] (S.D.N.Y. 1998).

[151] Scott v. University of Miss., 148 F.3d 493 [127 Educ. L. Rep. 688] (5th Cir. 1998).

In a second case from the District of Columbia, a former employee of a university's purchasing department who was dismissed for alleged insubordination to his supervisor had previously complained to the administration of supposed financial improprieties by the department's director. A jury returned a verdict in favor of the employee, agreeing that he was dismissed in retaliation for reporting the department's false claims and on his breach of contract claim against the director but not the university. On further review that was requested by both parties, the Circuit Court reversed the judgment of the jury regarding retaliation because the employee failed to show that he was engaged in a protected activity under the False Claims Act.[153]

A women's basketball coach sued a university for retaliation and discrimination when she was not promoted to an administrative post and was removed from another job that she performed. The coach alleged that her removal from the administrative position, regardless of whether it was defined as a demotion or a discharge, was an adverse employment action that qualified as a title VII retaliation claim. A federal trial court in Texas denied the university's motion for summary judgment since there were unresolved issues of material fact as to whether comments that were entitled to First Amendment protection were a motivating factor in the coach's removal.[154]

Financial Exigency

An employee in a university's procurement department claimed that he was dismissed as part of a RIF in retaliation for his seeking an early retirement option. The employee unsuccessfully charged that he was classified wrongly so that he would not be able to make such a retirement choice. An appellate court in the District of Columbia affirmed that since there was substantial evidence that the employee was classified correctly, he was not entitled to the early retirement option.[155]

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[152] Carney v. The American Univ., 151 F.3d 1090 [128 Educ. L. Rep. 652] (D.C. Cir. 1998).

[153] United States. *ex. rel.* Yesudian v. Howard Univ., 153 F.3d 731 [128 Educ. L. Rep. 1030] (D. C. Cir. 1998).

[154] Lowrey v. Texas A& M Univ. Sys., 11 F. Supp.2d 895 [129 Educ. L. Rep. 122] (S.D. Tex. 1998).

[155] Hoage v. Board of Trustees of Univ. of D.C., 714 A.2d 776 [128 Educ. L. Rep. 1101] (D.C. 1998).

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In North Carolina a university sought further review of an action in favor of an employee who claimed the university failed to follow state policy when he lost his job as part of a RIF. An appellate court reversed in favor of the university on the ground that its delay in informing the employee of his reemployment priority eligibility did not justify relief because he failed to show that the wait caused him any harm.[156]

Contract Issues

In the first of two cases from Ohio, an employee unsuccessfully filed suit against a medical college for breach of contract and promissory estoppel when she was not named the director of a new project between it and an outside organization because the Board of Trustees had questions about her resume. When the project was subsequently terminated, the employee was not hired for the position. On further review, an appellate court affirmed that only the board has the authority to hire personnel even if school officials indicated that they had the ability to do so.[157]

A vice president of academic affairs who was fired for not meeting the expectations of the president of the university sued for breach of contract and defamation. The vice president claimed that since he was released before his annual contract expired, the university committed a breach. The defamation claim arose out of a report given to the Board of Trustees criticizing the vice president's poor performance. The Ohio Court of Claims held that the university did not commit a breach because the Vice President's contract provided for dismissal for just cause and his dismissal was justified in light of his performance.[158] In addition, the court was of the opinion that since the report to the board was a privileged communication, it was not defamatory.

When an employee at a community college in New York was fired for incompetence and inability to meet her job responsibilities, she filed sued for wrongful dismissal and breach of contract. When a trial court denied the former employee's motion for partial summary judgment, she sought further review. An appellate court in New York affirmed the dismissal.[159] The court asserted that the terms and conditions of the policy manual, which did not detail a procedure for dismissals for cause, could not be engrafted upon the contract.

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[156] Neal v. Fayetteville State Univ., 507 S.E.2d 574 [131 Educ. L. Rep. 292] (N.C. Ct. App. 1998).

[157] Drake v. Medical College of Ohio, 698 N.E.2d 463 [128 Educ. L. Rep. 330] (Ohio Ct. App. 1997).

[158] Washington v. Central State Univ., 699 N.E.2d. 1016 [128 Educ. L. Rep. 1191] (Ohio Ct. Cl. 1998).

[159] Pearce v. Clinton Community College, 667 N.Y.S.2d 781 [123 Educ. L. Rep. 881] (App. Div. 1998).

In the first of two cases involving issues involving the Missouri Ethics Commission, a university finance director did not have to file a financial interest statement because he was not a decision-making public servant. An appellate court explained that although the employee could engage in negotiations, he did not have the final authority to approve a contract.[160] Similarly, the director of a university's extension office did not have to file a financial interest statement because he was not a decision-making employee. The court agreed that the Ethics Commission is necessarily empowered to evaluate whether public employees are decision-making public servants who are required to file financial interest statements while the Administrative Hearing Commission has power to review the Ethics Commission's assessment of late fees.[161]

When a former administrator at a community college was dismissed, he sued for breach of contract, denial of procedural and substantive due process, defamation, and discrimination. On further review requested by both parties, an appellate court in Maryland observed that since the college could not rely on sovereign immunity as an affirmative defense, the former administrator had a one-year filing deadline to advance his contract claims.[162]

Indemnification

A former administrator sued his university for indemnification due to his having to defend himself against claims filed by the Federal Deposit Insurance Corporation in connection with his service on a local bank board. The federal trial court in the District of Columbia reasoned that under university bylaws, the former administrator could seek indemnification for any claims arising from his involvement as a board member at the bank because he was serving in an official capacity as an institutional representative.[163] At the same time, the court commented that the former administrator was not entitled to indemnification for claims arising against him after his retirement from the university.

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[160] Missouri Ethics Comm'n v. Cornford, 955 S.W.2d 32 [122 Educ. L. Rep. 344] (Mo. Ct. App. 1997).

[161] Missouri Ethics Comm'n v. Wilson, 957 S.W.2d 794 [122 Educ. L. Rep. 1298] (Mo. Ct. App. 1997).

[162] Tschechtelin v. Samuels, 722 A.2d 414 [131 Educ. L. Rep. 1027] (Md. Ct. Spec. App. 1999).

[163] Harris v. Howard Univ., 28 F. Supp.2d 1 [131 Educ. L. Rep. 397] (D.D.C. 1998).

Denial of Employee Benefits

In Massachusetts, a former vice president sued a university's trustees for entitlement to dismissal benefits. An appellate court reflected that whether there was consideration for an alleged oral agreement regarding termination benefits was a question for the jury but that it could not be enforced under the statute of frauds.[164]

Retirement

In Ohio a retired faculty member sued the state Teachers Retirement System Board (TRSB) over pension benefits. An appellate court remarked that equitable estoppel did not prevent the application of statutes governing the calculation of service retirement benefits to determine the faculty member's pension. This ruling was determined despite his contention that he relied on advice and benefit projections from TRSB in making decisions as to his retirement.[165]

A medical school professor sued his university for breach of contract and violating the Employment Retirement Income Security Act (ERISA) for allegedly interfering with his retirement benefits and discharging him from his tenure contract. A federal trial court in New York partially granted the university's motion to dismiss by rejecting the professor's section 1983 claim since the private university was not a state actor.[166] However, the court refused to dismiss the ERISA claim since the professor pled sufficient facts to permit the case to proceed.

In Illinois a retired law professor sought administrative review and legal relief for the setting of the amount of his monthly annuity payment. An appellate court ruled that since the university contributed to the retirement system on behalf of the professor in excess of the amount needed to fund his annuity, the additional funds had to be applied for his benefit.[167]

A former employee who participated in a deferred retirement plan sued the university when his employment was terminated prematurely. The employee unsuccessfully sought injunctive relief along with damages for breach of contract and tort injuries. An appellate court in

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[164] Meng v. Trustees of Boston Univ., 693 N.E.2d. 183 [125 Educ. L. Rep. 550] (Mass. App. Ct. 1998).

[165] State *ex rel.* Shumway v. State Teachers Retirement Bd., 683 N.E.2d. 70 [120 Educ. L. Rep. 258] (Ohio Ct., App. 1996).

[166] Tavoloni v. Mount Sinai Med. Ctr., 984 F. Supp. 196 [123 Educ. L. Rep. 195] (S.D.N.Y., 1997).

[167] Mattis v. State Univ. Retirement Sys. 695 N.E.2d 566 [127 Educ. L. Rep. 928] (Ill. App. Ct. 1998).

Louisiana affirmed and remanded for a trial on the merits in acknowledging that the employee failed to establish that he would have suffered irreparable injury without the injunction.[168]

Unemployment Compensation

A clerk at a university medical center sued the Unemployment Insurance Appeal Board when it rejected her request for benefits since she was fired for misconduct. A trial court in New York agreed that since the dismissal was for misconduct and the employee was fired for violating the terms of her probation for excessive absences and failing to give notice of absences or provide medical documentation, she was effectively disqualified from receiving unemployment benefits.[169]

Harassment

The Sixth Circuit dismissed two appeals related to a civil rights claim scheduled for trial in federal district court in Kentucky.[170] First, the panel refused to hear an appeal challenging the denial of qualified immunity where a university disagreed with several of the district court's factual determinations. The court also refused to hear an appeal of the trial court's contention that the university's sexual harassment policy was facially unconstitutional.

In a case from Oklahoma a former employee sued a community college for sexual harassment in violation of title VII. On further review, the Tenth Circuit affirmed a jury verdict in favor of the employee when it agreed that the college's sexual harassment policy was deficient.[171] The court was convinced that the college's failure to investigate the complaint fully created a reasonable cause of action for liability against it for sexual harassment.

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[168] Page v. Grambling State Univ., 722 So. 2d 329 [131 Educ. L. Rep. 866] (La. Ct. App. 1998).

[169] In the Matter of the Claim of Samantha Prior, 679 N.Y.2d. 200 [130 Educ. L. Rep. 246] (App. Div. 1998).

[170] Booher v. Northern Ky. Univ. Bd. of Regents, 163 F.3d 395 [131 Educ. L. Rep. 378] (6th Cir. 1998).

[171] Wilson v. Tulsa Junior College, 164 F.3d 534 [131 Educ. L. Rep. 686] (10th Cir. 1998).

Tort Liability

Negligence

A *prima facie* case for negligence includes pleading and proving duty of due care, breach, proximate cause, and injuries or real damages. When a plaintiff satisfies a *prima facie* case, a defendant can rebut any of the elements, allege an affirmative defense of comparative negligence, assumption of risk, or claim immunity. Negligence cases are presented under the broad categories of scope of duty, affirmative defenses, and statutory immunity defenses.

Scope of Duty

A variety of fact patterns arise in negligence cases. In each of the cases, a plaintiff suffered an injury and the legal issues in question revolve around whether a duty was breached and whether foreseeable causation existed between the breach of duty and the resulting injury.

Fraternity Hazing

When a fraternity pledge died from alcoholic poisoning during a hazing incident, his family sued the fraternity and various officers for negligently and recklessly causing his intoxication, continuing to give him alcoholic beverages after he was drunk, and failing to provide medical assistance while knowing that his life was in danger. The fraternity and its officers unsuccessfully filed a motion to dismiss in arguing that there was no cause of action against them because the pledge voluntarily became intoxicated. An appellate panel in New York affirmed the rejection of the motion to dismiss insofar as it noted that compulsion and peer pressure cast serious doubt on the voluntary nature of the pledge's action.[172] The court believed that the coercive effect of the initiation ritual and related issues of culpable conduct were matters for the trier of fact to resolve.

In another hazing incident, a student who was injured during a hazing challenged a grant of summary judgment in favor of a national fraternity. An appellate court in Louisiana affirmed that the fraternity could not have been liable since it clearly prohibited hazing in membership selection and it did not have a representative present at the incident that led to the injury.[173]

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[172] Oja v. Grand Chapter of Theta Chi Fraternity, 667 N.Y.S.2d 650 [123 Educ. L. Rep. 867] (App. Div. 1998).

[173] Walker v. Phi Beta Sigma, 706 So. 2d 525 [124 Educ. L. Rep. 478] (La. Ct. App. 1997).

Bodily Injury

A variety of types of injury cases were litigated based on negligence. A student at a beauty college who injured her back as she helped a client return to a sitting position after washing her hair unsuccessfully sued the school. An appellate court reversed the grant of summary judgment on the basis that there were factual issues remaining that could not be resolved as a matter of law. On further review, the Supreme Court of Oklahoma reinstated the dismissal because no legal authority existed to place a duty on the college to instruct its students on how to help clients into an upright position and no premises defect of a hidden nature caused or contributed to the injury.[174] The court was satisfied that the college provided a general warning to students about the pressure of a career in cosmetology and the possibility of injury, thereby meeting its duty of ordinary care.

In Mississippi a student who was injured in an off-campus, two-car automobile accident with a college coach sued the coach and the college to recover damages for injuries. A federal trial court granted the college's motion for summary judgment in commenting that under state law, the coach was not acting within the scope of his employment at the time of the accident.[175]

When a student employee who conducted a dormitory checkout was attacked at an off-campus nightclub by another student who had been expelled, a trial court entered a jury verdict on the injured student's behalf finding the university 80% negligent and her 20% at fault. On further review, an appellate court in Wisconsin reversed in favor of the university.[176] According to the court, the cause of the injury was too remote from the university's negligence and permitting such a recovery would have entered a field that had no sensible or just stopping point.

In the first of two cases from New York, a student who was stabbed during a fight while attending night classes sued the school. Subsequently, he challenged a grant of summary judgment in favor of the school. An appellate court affirmed, finding the non-degree granting business school was the functional equivalent of college insofar as it was not the guarantor or insurer of safety of its students and that the school was not on notice of the likelihood of dangerous conduct by the other student.[177]

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[174] Weldon v. Dunn, 962 P.2d 1273 [129 Educ. L. Rep. 485] (Okla. 1998).

[175] Smith v. Gardner, 998 F. Supp. 708 [126 Educ. L. Rep. 731] (S.D. Miss. 1998).

[176] Conroy v. Marquette Univ., 582 N.W.2d 126 [127 Educ. L. Rep. 1068] (Wis. Ct. App. 1998).

[177] Ellis v. Mildred Elley Sch., 667 N.Y.S.2d 86 [123 Educ. L. Rep. 838] (App. Div. 1997).

A university sought further review of the denial of its motion for summary judgment where a student filed suit for a knee injury that he sustained when he slipped and fell on a campus sidewalk that was covered by snow and slush. An appellate court in New York affirmed the denial of the university's motion for summary judgment.[178] The court pointed out that in light of the standard of landowner liability for a slip and fall injury, there were unresolved factual issues as to when and if the sidewalk where the student fell was cleared.

Other Negligence Claims

The conservator of the estate of a prisoner sued a medical college and a faculty member for negligence after a student resident in psychology sexually assaulted the inmate. The federal trial court in Connecticut dismissed all of the estate's claims except for the one against the faculty member.[179] The court indicated that there was an unresolved issue of fact as to whether the faculty member, who was the only person at the medical college who knew about the resident's unpredictably, acted as an agent of the college. The court suggested that if the faculty member was an agent of the college, he would have had the responsibility to notify school officials of the potential danger that the resident posed to the inmate.

A student relied on title IX in suing a professor who allegedly sexually harassed her and the university for its deliberate indifference to his actions. A federal trial court in Indiana denied the university's motion for summary judgment since there was sufficient evidence of its awareness of the professor's prior pattern of sexual harassment of students and the complaint was sufficiently specific to state a viable claim for negligent retention.[180]

When the State Comptroller's Office followed a university president's directive by withdrawing a paycheck of a faculty member that had been directly deposited, a trial court in Florida dismissed the professor's negligence action against the Comptroller, the board of regents, and the bank. An appellate court in Florida affirmed the dismissal since there was no allegation of a tort separate and independent from the contracts between the parties.[181] However, the court permitted the suit against the university president to proceed.

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[178] Polgar v. Syracuse Univ., 680 N.Y.S.2d 132 [130 Educ. L. Rep. 1304] (App. Div. 1998).

[179] Garamella for Estate of Almonte v. New York Med. College, 23 F. Supp.2d 153 [130 Educ. L. Rep. 1161] (D. Conn. 1998).

[180] Chontos v. Rhea, 29 F. Supp.2d 931 [131 Educ. L. Rep. 965] (N.D. Ind. 1998).

[181] Smith v. Florida Bd. of Regents, 701 So. 2d 348 [122 Educ. L. Rep. 539] (Fla. Dist. Ct. App. 1997).

A student in a culinary apprenticeship program at a community college who claimed that the director of the program raped her sued, unsuccessfully, the state board for negligence. On further review, an appellate court in Louisiana reversed in favor of the student.[182] The court ascertained that the college was negligent in hiring the director without conducting a criminal background check, that the state was vicariously liable for the rape, and that the lowest award the student was entitled to was $100,000.

Affirmative Defenses

Assumption of Risk

When a member of the college men's rowing team was badly injured in a collision with a boat rowed by a woman's team as both were practicing for a regatta, an appellate panel in Georgia affirmed a trial court's refusal to grant directed verdicts in favor of the defendants.[183] First, the court was of the opinion that since there was sufficient evidence for the jury to find that gross negligence could have caused the injury, the denial of the motion was appropriate. Second, the panel affirmed the trial court's refusal to grant a directed verdict for the defendants based on assumption of risk. Third, the court did not believe that the evidence required a finding that the injured rower was aware of and acquiesced to the specific risk that he would have been hurt in the manner he was due to the gross negligence of others.

Contributory Negligence

A student who stepped into a slight depression and burned his feet in boiling water sued his university for negligence. The Ohio Court of Claims dismissed the claim since the university did not have actual or constructive notice of the dangerous condition.[184] Further, the court was convinced that the student was negligent because by stepping into the depression late at night to urinate, he did not use sufficient care for his own safety.

When a student was blinded after he was hit in the eye with a paint ball during a fraternity sponsored "war games" event for prospective pledges, he unsuccessfully sued the national fraternity, local chapter, and the chapter's president for negligence. An appellate court in Texas ruled that the defendants were not liable due to the contributory negligence of the student who was injured.[185]

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[182] Harrington v. Louisiana State Bd. of Elementary and Secondary Educ., 714 So. 2d 845 [128 Educ. L. Rep. 531] (La. Ct. App. 1998).

[183] Trustees of Trinity College v. Ferris, 491 S.E.2d 909 [121 Educ. L. Rep. 1167] (Ga. Ct. App. 1997).

[184] Butch v. University of Cincinnati, 695 N.E.2d 1245 [126 Educ. L. Rep. 1116] (Ohio Ct. Cl. 1997).

Statutory Immunity

After an eighteen-year-old freshman became intoxicated in his campus dormitory, a housing director called the police because he was underage and the director feared for the student's safety. Several hours after the student was dismissed from the hospital, he inflicted superficial wounds on his wrists with a dull pocketknife. Even though he denied that he attempted to commit suicide, the University Counseling Center's Crisis Intervention Team (CIT) intervened. When the CIT determined that the student was a low risk for committing suicide, his parents were not notified about the incident. Less than three years later, the student committed suicide and his parents unsuccessfully filed a wrongful death action against the university. The parents alleged that university employees negligently failed to monitor, treat, or counsel their son or to inform them about his earlier attempt at taking his own life. On further review, the Supreme Court of Wyoming affirmed that the defendants were immune under the state's Governmental Claims Act.[186]

A construction worker sought further review of the denial of his negligence and nuisance charges against a university and one of its employees after he was injured when he fell from a ladder. The Supreme Court of Michigan affirmed a grant of summary judgment in favor of the defendants on the ground that the public building exception provided immunity.[187]

A student who fell from a ladder while cleaning a storage space for an art professor sued the university for negligence. The Supreme Court of Colorado declared that the student could pursue her suit based on the university's waiver of immunity for a dangerous condition in a public facility that constituted an unreasonable risk to the health and safety of the public.[188]

In a second case from Colorado, where a student who was injured during a physical education class sued the state and the directors of the higher education center on whose field the mishap occurred, the defendants sought further review of the denial of their motion to dismiss. An appellate court affirmed that the governmental immunity act waived the university's protection since the athletic fields where the injury took place were in a recreational area.[189]

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[185] Moore v. Phi Delta Theta, 976 S.W.2d 738 [129 Educ. L. Rep. 875] (Tex. Ct. App. 1998).

[186] White v. University of Wyo., 954 P.2d 983 [125 Educ. L. Rep. 904] (Wyo. 1998).

[187] Kerbersky v. Northern Mich. Univ., 582 N.W.2d 828 [128 Educ. L. Rep. 870] (Mich. 1998).

[188] Walton v. State of Col., 968 P.2d 636 [131 Educ. L. Rep. 272] (Colo. 1998).

The father of a student in Georgia sued a university's board of regents alleging that employees of its medical college negligently under-medicated his son before releasing him from the hospital. The student, who was a chronic paranoid schizophrenic with violent tendencies, had been admitted to the hospital to correct a low blood count due to his medication. When he was released from the hospital to visit his mother, the student murdered her. An appellate court held that the state had not waived its sovereign immunity for losses resulting from assault and/or battery.[190]

A faculty-student association (FSA) of a state university challenged the denial of its motion for summary judgment in a suit filed by a student who lost an eye due to injuries he sustained while sledding on an university-owned inner tube on university property. An appellate court in New York affirmed that the FSA was not entitled to summary judgment on the ground of assumption of risk since the sledder raised an issue of fact whether he knew there were branches on the side of the hill.[191] However, the court granted the FSA's motion based on the recreational use statute since FSA neither received consideration for the use of its property for sledding nor charged a fee for doing so.

In Indiana a pedestrian who planned to attend a basketball game at a state university was injured when he slipped on the ice in the parking lot outside the arena. On further review of a grant of summary judgment in favor of the university, an appellate court affirmed that for the purposes of the state tort claims act, the parking lot should be considered a public thoroughfare.[192] The court added that the university was immune for injuries caused by a temporary condition in the parking lot brought about by bad weather.

The first of two cases from Texas was filed by parents who sued a university alleging that although officials knew that one of their students photographed and videotaped their children in explicit sexual positions, it continued to rent him a dormitory room. When a trial court denied the university's motion to dismiss, it sought further review. An appellate court in Texas reversed in favor of the university because the parents failed to allege that the injuries arose out of the use of tangible real property within the meaning of state law.[193]

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[189] Denmark v. State of Colo., 954 P.2d 624 [125 Educ. L. Rep. 891 (Colo. Ct. App. 1997).

[190] Board of Regents of the Univ. Sys. of Ga. v. Riddle, 493 S.E.2d 208 [122 Educ. L. Rep. 533] (Ga. Ct. App. 1997).

[191] Heminway v. State Univ. of N. Y., 665 N.Y.S.2d 493 [122 Educ. L. Rep. 1050] (App. Div. 1997).

[192] Brunner v. Trustees of Purdue Univ., 702 N.E.2d 759 [130 Educ. L. Rep. 1318] (Ind. Ct. App. 1998).

A community college in Texas unsuccessfully relied on sovereign immunity as a defense when it faced contract and tort claims filed by the construction company it hired to work on a drainage project. An appellate court affirmed that the legislature waived the college's immunity by subjecting it to the same general law governing independent school districts.[194]

In the first of two cases from New Jersey, a university challenged a jury verdict in favor of a student who was injured after he slipped in a puddle and fell in a university-operated pub. An appellate court reversed in favor of the university in positing that statutory immunity applied because operating the pub was within its educational goals.[195]

A student who was injured as she slipped and fell on an accumulation of ice in a university owned parking lot, sued it for the dangerous conditions that existed in the parking lot. The university sought further review of the denial of its motion for summary judgment. An appellate court in New Jersey reversed in concluding that the university was entitled to common law snow removal immunity.[196]

Qualified Immunity

As illustrated by a case from Georgia, qualified immunity is available for constitutional torts. A thirteen-year-old student, one of only two females enrolled in a military college's high school program, was raped during the four-week summer session when only first-year high school students and the college football team were on campus. The girl's mother unsuccessfully sued the college and various educators in their official and individual capacities for depriving her daughter of her right to substantive due process. The Eleventh Circuit affirmed the defendants' motion to dismiss because it could not find that the college or its personnel had a clear constitutional duty to protect the student from rape in this voluntary, custodial relationship.[197] The court agreed that the officials were entitled to qualified immunity since the alleged constitutional right to personal security and physical integrity was not clearly established and it preferred to use judicial restraint rather than create a new constitutional standard.

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[193] Lamar Univ. v. Doe, 971 S.W.2d 191 [127 Educ. L. Rep. 1124] (Tex. Ct. App. 1998).

[194] Alamo Community College Dist. v. Obayashi Corp., 980 S.W.2d 745 [131 Educ. L. Rep. 531] (Tex. Ct. App. 1998).

[195] Bloom v. Seton Hall Univ., 704 A.2d 1334 [123 Educ. L. Rep. 782] (N.J. Super. Ct. App. Div. 1998).

[196] Sykes v. Rutgers, 705 A.2d 1241 [124 Educ. L. Rep. 341] (N. J. Super. Ct. App. Div. 1998).

[197] Santamorena v. Georgia Military College, 147 F.3d 1337 [127 Educ. L. Rep. 662] (11th Cir. 1998).

Defamation

A federal trial court in Pennsylvania denied a petition to dismiss a defamation action that a male administrative assistant brought against the dean of a school of nursing.[198] In a meeting with the administrative assistant's two direct supervisors, the Dean said that the administrative assistant was "sick" and "vindictive," accused him of abusing his sick time and time off, and implied that he was having an inappropriate affair with one of the supervisors. The court maintained that the statements were defamatory as expressions of actionable mixed opinion, understood by supervisors as defamatory, met the harm element of defamation claim by the personal humiliation, mental anguish and suffering of the administrative assistant, and exceeded the dean's conditional privilege by a pattern of activity designed to harm the plaintiff's reputation.

In the first of two cases from New York, a faculty member in a law school challenged his denial of tenure by suing the school, denouncing the action in a press release, discussing his complaint in his civil procedure class, and placing copies of the complaint on reserve in the library. A trial court dismissed the professor's libel claim against an assistant attorney general who was quoted in the school's newspaper as saying that the plaintiff's inexperience in litigation was obvious from the many errors in his pleading. An appellate court subsequently affirmed the dismissal of the libel claim since the statements in the school newspaper were not made with actual malice.[199]

When the chair of a department of surgery in a teaching hospital gave a poor performance review to the chief resident, the resident wrote a letter to the chair's superiors claiming that he did so in retaliation for his own failure to respond to the chair's sexual advances. The letter detailed the chair's purported inappropriate and unprofessional acts of harassment, which included flirtatious comments about the resident's physical attributes, numerous invitations to travel or dinner, and unwanted physical contact. The chair unsuccessfully filed a defamation *per se* claim based upon the statements made in the letter. The chair alleged that after the hospital investigated the charges, it reprimanded the chief resident because it discovered that his charges were unsubstantiated. An appellate court in New York reversed in favor of the chair in observing that the resident's statements tended to injure the chair in his business or profession. The court discerned that since the claim that the chair would misuse his supervisory power to obtain sexual favors clearly reflected adversely on his integrity as a physician and professor of medicine, it was unnecessary to make a showing of special damages as part of the *prima facie* case.[200]

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[198] Rockwell v. Allegheny Health, Educ. and Research Found., 19 F. Supp.2d 401 [130 Educ. L. Rep. 554] (E.D. Pa. 1998).

[199] Blum v. State of N.Y., 680 N.Y.S.2d 355 [130 Educ. L. Rep. 1314] (App. Div. 1998).

As illustrated by a case from Kentucky, administrators enjoy qualified immunity when communicating with each other over personnel matters. An appellate court affirmed the dismissal of a defamation suit that was filed by a visiting faculty member who was seeking a tenure track position.[201] The faculty member claimed that a memorandum between him and an acting vice president of academic affairs was improperly copied to his dean and the university president.

A former medical resident unsuccessfully sued his university for defamation and breach of contract for statements that a program director made in response to a request for credential verification. Based on documents in the resident's file, the director felt compelled to mention reservations that he had about the plaintiff's competency. In the letter, the director stressed that his recommendations should not be taken as primary judgment but should act as a warning for a hospital to check the resident's clinical experiences since he had left the university. The Ohio Court of Claims granted the university's motion for summary judgment.[202] The court was satisfied that the university presented convincing evidence that there was no malice on the part of the director who was required to respond truthfully to all requests dealing with credentials.

Worker's Compensation

A former employee of a state university relied on the state's anti-retaliation law in claiming that he was fired for filing a worker's compensation claim. On further review of the denial of the university's motion for summary judgment, an appellate court in Texas reversed and dismissed in favor of the university based on sovereign immunity.[203]

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[200] Chiavarelli v. Williams, 681 N.Y.S.2d 276 [131 Educ. L. Rep. 467] (App. Div. 1998).

[201] Landrum v. Braun, 978 S.W.2d 756 [130 Educ. L. Rep. 937] (Ky. Ct. App. 1998).

[202] Ostasz v. Medical College of Ohio, 691 N.E.2d 371 [124 Educ. L. Rep. 372] (Ohio Ct. Cl. 1997).

[203] Southwest Texas State Univ. v. Enriquez, 971 S.W.2d 684 [127 Educ. L. Rep. 1144] (Tex. Ct. App. 1998).

Contract Liability

A dining service provider sued a university for a variety of claims when it failed to pay for food and services. An appellate court in Texas affirmed that the university waived sovereign immunity from suits on the contract and quasi contract claims since the service provider presented evidence that the university ordered, accepted, used and failed to pay for the goods and services.[204] However, the court wrote that the university was immune from suit on tort and constitutional claims.

Contract Terms

After a child at baseball camp was hit in the mouth by a coach who was swinging a baseball bat, the child and his father sued the hosting university. The Supreme Court of Mississippi decreed that the plaintiffs' negligence suit against the university was barred by sovereign immunity.[205] At the same time, the court remanded the charge dealing with implied contract because there were unresolved issues of material fact.

In Indiana a law student who misrepresented information on his resume and was expelled when the lie was discovered claimed that a school code provided that if his appeal was not resolved, the dean had to submit it to a review board. The dean responded that insofar as he resolved the matter, the student was not entitled to appeal to the review board. On further review of the rejection of the student's suit, an appellate court affirmed that since the dean reasonably interpreted the code, as a matter of law, the student had no contractual right to a hearing before the review board.[206]

A student with a disability in Wyoming sued his vocational school for discrimination. The federal district court reasoned that the student's right not to be discriminated against and his contractual relationship with the school created a special relationship. As such, the court explained that the school could be sued for breach of an implied covenant of good faith and fair dealing due to its failure to accommodate the student's disability.[207]

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[204] Texas S. Univ. v. Aráserve Campus Dining Servs. of Tex. Inc., 981 S.W.2d 929 [131 Educ. L. Rep. 858] (Tex. Ct. App. 1998).

[205] Quinn v. Mississippi State Univ., 720 So. 2d 843 [130 Educ. L. Rep. 1362] (Miss. 1998).

[206] Gagne v. Trustees of Ind. Univ., 692 N.E.2d 489 [124 Educ. L. Rep. 1030] (Ind. Ct. App. 1998).

[207] Powers v. MJB Acquistion Corp., 993 F. Supp. 861 [125 Educ. L. Rep. 420] (D. Wyo. 1998).

Bidding

When a university solicited bids for fire alarm systems and required a lump sum bid accompanied by unit prices, it awarded the contract to the company that submitted the lowest bid even though the company failed to include unit prices. Once the university realized that the winning bidder omitted the unit prices, it terminated the contract and announced that the contract would be rebid. In response, the next lowest bidder, which did include unit prices, sued. The Supreme Court of Connecticut asserted that the university did not have to award the contract to the next lowest bidder because that company failed to offer either an argument or any authority for making such an extraordinary claim.[208]

Contract Liability

In Rhode Island a student unsuccessfully sued a university for breach of contract when it denied his application to a graduate program even though he had been admitted on a probationary, special basis. The First Circuit affirmed the dismissal of the student's claim in finding that since admissions decisions involve a quintessential matter of academic judgment, the judiciary must grant great deference to institutions of higher learning in such matters.[209] In addition, the court was of the view that the university did not act arbitrarily or in bad faith in denying the student's application.

A medical resident unsuccessfully sued a university for breach of contract claiming that it failed to provide all the training that it promised. On further review, an appellate court in North Carolina reversed in favor of the student.[210] The court allowed the suit to proceed in ruling that the university failed to provide the student with the necessary training that he was supposed to receive.

Provision of Wages

Basketball coaches sued the NCAA claiming that its salary cap rule for entry level positions violated the Sherman Act as an illegal restraint of trade. The federal district court in Kansas granted the coaches' motion for summary judgment and permanently enjoined the NCAA from reenacting the rule since the NCAA failed to establish that it would have enhanced competition or promoted a legitimate, competitive goal. The court also imposed sanctions and attorney fees against the NCAA. On appeal, the Tenth Circuit affirmed that the compensation limit was an unlawful restraint of trade under a rule of reason analysis.[211] However, in a separate opinion, the court set aside the daily fines for failing to pay attorney fees on the ground that it amounted to criminal contempt imposed without following essential procedures.[212] The Supreme Court subsequently denied the NCAA's petition for a writ of *certiorari*.[213]

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[208] Blesso Fire Sys. v. Eastern Conn. State Univ., 713 A.2d 1283 [128 Educ. L. Rep. 298] (Conn. 1998).

[209] Mangla v. Brown Univ., 135 F.3d 80 [123 Educ. L. Rep. 538] (1st Cir. 1998).

[210] Ryan v. University of N. C. Hosps., 494 S.E.2d 789 [123 Educ. L. Rep. 358] (N.C. Ct. App. 1998).

Conclusion

The case law reviewed in this chapter demonstrates that higher education continues to experience a profusion of litigation. The areas requiring significant legal attention included employee dismissal, discrimination, sexual harassment, and institutional authority. Other important issues involving student free speech and affirmative action remain only temporarily resolved and are expected to undergo further legal clarification in the near future. As far as colleges and universities are concerned, Eleventh Amendment immunity proved to be a frequently used and increasingly contested area that will no doubt also require additional clarification.

The consistent pattern in the high volume of litigation in higher education indicates that many of the areas of law remain unsettled and transformative. Understanding the patterns in case law and judicial opinions during this precarious legal period provides valued insight for institutional leaders, administrators, faculty, and students as they attempt to traverse the rugged and unpredictable terrain of the law of American higher education.

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[211] Law v. National Collegiate Athletic Ass'n, 134 F. 3d 1010 [123 Educ. L. Rep. 510] (10th Cir. 1998).

[212] Law v. National Collegiate Athletic Ass'n, 134 F. 3d 1025 [124 Educ. L. Rep. 33] (10th Cir. 1998).

[213] National Collegiate Athletic Ass'n v. Law, 119 S. Ct. 65 [129 Educ. L. Rep. 928] (1998).

9

STUDENTS IN HIGHER EDUCATION

Terrence Leas

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Introduction

Students persisted in challenging the discretionary authority of institutional officials during the last year. Students sought to change institutional practices or to obtain redress from officials for alleged injuries using a variety of causes of action, including federal and state anti-discrimination statutes, breach of contract, and negligence.

Admission or Matriculation

Admission

Students continued to use a variety of causes of action in questioning the discretionary authority of officials at colleges and universities with regard to admissions. In cases where officials failed to act consistently with their own rules and regulations or in accord with contractual agreements, courts willingly supported the plaintiffs. The Tenth Circuit held that an applicant who was denied a place in a state university's medical school in New Mexico had standing to seek an injunction ordering her admission.[1] In acknowledging that the medical school's admission policy favored long-term residents over short-term residents if other criteria were equal, the court posited that the policy caused the rejected applicant to compete at a disadvantage.

In New York, a student obtained a preliminary injunction against the Educational Testing Service (ETS) when it canceled her scores for allegedly cheating on the Graduate Record Examination. An appellate court decided that the contractual relationship between the student and the ETS required it to follow its duty of good faith and fair dealing.[2] The court ruled that expert evidence attacking the methodology used by ETS in concluding that the student cheated, evidence that the discrepancy between the student's test scores was attributable in part to prescription medication she was taking, and the fact that ETS destroyed the respective test booklet all raised questions of material fact over whether ETS honored its contractual obligation to the student.

An appellate court in Illinois affirmed that a university breached its implied contract with students in a graduate applied physiology program when it only admitted the top fifty applicants to its medical school.[3] The court pointed out that university officials had told students they could enter medical school if they earned a grade point average of 3.0 or higher.

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[1] Buchwald v. University of N.M. Sch. of Med., 159 F.3d 487 [130 Educ. L. Rep. 428] (10th Cir. 1998).

[2] Cortale v. Educational Testing Serv., 674 N.Y.S.2d 753 [127 Educ. L. Rep. 966] (App. Div. 1998).

[3] Brody v. Finch Univ. of Health Sciences, 698 N.E.2d 257 [128 Educ. L. Rep. 1135] (Ill. App. Ct. 1998).

Students and applicants continued to challenge affirmative action admissions programs at state institutions. In Rhode Island, the First Circuit affirmed in favor of university officials who admitted the plaintiff to graduate school as a probationary special student but subsequently denied his application for admission into a computer science master's degree program.[4] The court agreed that the officials acted in good faith and contractually were neither obligated nor required to admit the student based on promissory estoppel.

In the first of two cases from Texas, a federal trial court on remand in *Hopwood* explained that evidence in the record was sufficient to support the finding that non-minority applicants to the law school at a state university would not have had a reasonable chance of acceptance under an admissions system that relied on unlawful racial preferences.[5] The court also settled issues concerning damages for mental anguish and attorney fees.

The Fifth Circuit rejected the state's motion to dismiss in contending that a material issue of fact existed regarding whether an admissions committee in Texas considered race during the first screening phase.[6] The court emphasized that diversity is not a compelling state interest that justifies the use of racial preferences in admissions at a public university. The panel also noted that Congress validly abrogated the states' Eleventh Amendment immunity from suit in federal court for violations of Title VI.

Unsuccessful applicants in Washington failed in their challenge to allegedly racially discriminatory admissions practices at a state law school.[7] A federal trial court was satisfied that the students were entitled to class status.

Judges continue to respect the professional judgment of college and university officials who comply with their own and judicial rules. For example, university officials prevailed in a case from New York where a plaintiff was unable to convince a federal court that he could reintroduce as a nonexpert the same witness he originally designated as a psychiatric expert and later withdrew.[8]

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[4] Mangla v. Brown Univ., 135 F.3d 80 [123 Educ. L. Rep. 538] (1st Cir. 1998).

[5] Hopwood v. Texas, 999 F. Supp. 872 [126 Educ. L. Rep. 844] (W.D. Tex. 1998).

[6] Lesage v. State of Tex., 158 F.3d 213 [130 Educ. L. Rep. 37] (5th Cir. 1998).

[7] Smith v. University of Wash. Law Sch., 2 F. Supp.2d 1324 [127 Educ. L. Rep. 151] (W.D. Wash. 1998).

[8] Agron v. Trustees of Columbia Univ., 176 F.R.D. 445 [124 Educ. L. Rep. 328] (S.D.N.Y. 1997).

Sometimes plaintiffs ask judges to address the obvious. A college in South Carolina experienced additional challenges to its traditional male-only admissions policy even after it abandoned that policy. Following the Supreme Court's denial of certiorari in *Faulkner v. Jones*,[9] the Fourth Circuit asserted that an order granting a student's motion to enjoin the college from continuing or resuming its male-only admissions policy was neither necessary nor justified.[10] Once the college abandoned its male-only policy, the panel commented that the trial court lacked the basis to intervene absent evidence that the school had any intention of returning to its male-only policy.

A medical student unsuccessfully challenged a state university's denial of his application for in-state status.[11] The Supreme Court of Vermont, in confirming the university's statutory authority to distinguish between in-state and out-of-state residents for tuition purposes, was of the opinion that the institution can require proof of residency by clear and convincing evidence. The court added that the determination of residency status did not involve a right that merited a greater level of due process protection.

Matriculation

Even after admission, students who faced questionable treatment at the hands of officials of colleges and universities gained judicial support. Where a college closed a campus before students finished their graduate degree program, the plaintiffs sought further review of a grant of summary judgment in their suit for breach of contract and other violations. An appellate court in Alabama reversed in favor of the students due to ambiguous terms in the college's contract with them.[12] The court questioned whether a college fulfills its contractual obligations to students if it merely gives them instruction for which they have paid tuition on a semester-by-semester basis.

Outside agencies learned that judges are willing to limit the exercise of their authority. A nursing student in Louisiana successfully challenged the state Board of Nursing which denied his entrance to the clinical phase of his nursing program. The court vacated in favor of the student in indicating that the board lacked jurisdiction to impose disciplinary action against a student nurse who had neither applied for licensure nor was licensed.[13]

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[9] Faulkner v. Jones, *cert. denied*, 116 S. Ct. 352 [105 Educ. L. Rep. 396] (1995).

[10] United States v. Jones, 136 F.3d 341 [124 Educ. L. Rep. 48] (4th Cir. 1998).

[11] Huddleston v. University of Vt., 719 A.2d 415 [130 Educ. L. Rep. 224] (Vt. 1998).

[12] Craig v. Forest Instit. of Psychology, 713 So. 2d 967 [128 Educ. L. Rep. 500] (Ala. Civ. App. 1997).

[13] Hemphill v. Louisiana St. Bd. of Nursing, 713 So. 2d 1265 [128 Educ. L. Rep. 519] (La. Ct. App. 1998).

In Minnesota, the Eighth Circuit ruled against the Commissioner of Social Security in observing that medical residents in a state university graduate medical education program are not employees under the terms of the state social security agreement.[14] The court further maintained that even if the medical residents were employees, their student status excluded them from the agreement.

Tuition and Fees

In the only case addressing tuition and fees, an appellate court in New York reversed in deferring to the discretionary authority of state officials where students at a community college challenged a tuition increase.[15] Moreover, the court discerned that the since the students were not prevailing plaintiffs, they were not entitled to attorney fees.

Financial Aid

Institutional Eligibility

During the past year, courts considered various aspects of institutional eligibility to manage and distribute federal financial aid, including distinguishing the respective roles of institutions and guarantors. In cases involving the Department of Education, judges favored the Secretary of Education's actions.

Federal Qualifications

The Fifth Circuit handed down a judgment against a proprietary vocational technical school that delivered training programs to inmates in privately owned prison facilities in Texas.[16] The school awarded Pell Grants to the inmates in its programs while including living expenses and other costs in its calculations of the awards. However, since the inmates did not pay living expenses and other costs, the Department of Education sought to recover the excess amounts of financial aid awarded to the prisoners and paid to the school. The court agreed with the Department of Education in supporting its request for recovery of all expenses other than tuition and fees.

In a case from Kansas involving a nonprofit vocational school, the Tenth Circuit[17] rejected officials' attempts to overturn the Secretary of

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[14] State of Minn. v. Apfel, 151 F.3d 742 [128 Educ. L. Rep. 643] (8th Cir. 1998).

[15] Apollon v. Giuliani, 675 N.Y.S.2d 38 [127 Educ. L. Rep. 985] (App. Div. 1998).

[16] Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044 [125 Educ. L. Rep. 332] (5th Cir. 1998).

[17] Mission Group Kan. v. Riley, 146 F.3d 775 [127 Educ. L. Rep. 70] (10th Cir. 1998).

Education's imposition of the "85/15 rule." This rule requires for-profit institutions of higher education to derive 15% of their tuition revenues from nonfederal sources in order to be eligible for federally guaranteed financial aid. In ordering a remand, the court was content that the Secretary's action was not an interpretation of agency regulations subject to deference under the *Chevron*[18] framework for reviewing an agency's interpretation of its own statutes. According to the court, compliance by an organization with the minimum eligibility requirements for certification does not mandate certification by the Secretary.

A federal trial court in Arizona rejected the argument that the private guarantor of federally guaranteed student loans was negligent when a for-profit technical institute filed for bankruptcy.[19] The plaintiffs alleged that the guarantor owed them a duty of reasonable care once it assumed inspection and enforcement responsibilities as a guaranty agency and that it breached its duty by failing to conduct a prompt investigation of charges of mismanagement by the institute. The court decreed that federal regulations specifying items that the Secretary of Education must include in a basic agreement with a guarantor of federally guaranteed student loans do not impose a duty on the guarantor with respect to students.

State Agency Qualifications

In actions against the state or institutions over state qualifications to receive state aid, institutions generally fared poorly. A private religious college failed to establish its qualifications to receive aid from the state of Maryland.[20] The federal trial court wrote that the college was so pervasively sectarian that it could not qualify to receive direct state funding under the Establishment Clause.

A federal trial court in New York declared that the state's deregistration of a junior college as a participant in the Tuition Assistance and Supplemental Tuition Assistance Programs neither violated the equal protection clause nor established unlawful differential treatment of the school.[21] A second court addressed allegations of fraud brought by a former state investigator against a proprietary school, his supervisor, and the state of New York. A federal trial court reasoned that the Eleventh Amendment did not bar a *qui tam* action against the state.[22]

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[18] Chevron, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[19] Kearns v. Tempe Technical Inst., Inc., 16 F. Supp.2d 1119 [129 Educ. L. Rep. 1060] (D. Ariz. 1998).

[20] Columbia Union College v. Clarke, 988 F. Supp. 897 [124 Educ. L. Rep. 534] (D. Md. 1997).

[21] Interboro Inst., Inc. v. Maurer, 984 F. Supp. 119 [123 Educ. L. Rep. 171] (N.D.N.Y 1997).

[22] United States *ex rel.* Long v. SCS Bus. & Tech. Instit., 999 F. Supp. 78 [126 Educ. L. Rep. 776] (D.D.C. 1998).

Even so, the court was convinced that the Eleventh Amendment precluded an action against the state under the federal whistleblower statute.

Procedures & Qualifications

Federal officials continued to receive support from the courts. The Supreme Court, in *Regions Hospital v. Shalala*,[23] held in a 6–3 decision that the Secretary of Health and Human Services' interpretation of the Graduate Medical Education (GME) amendment[24] to permit a second audit of a teaching hospital's 1984 GME costs was reasonable. The Court stated that the reaudit regulation was a permissible retroactive way to ensure accurate reimbursements to teaching hospitals under the Medicare Act and that doing so did not violate the principles of issue preclusion.

Title IV of the Higher Education Act[25] (HEA) governs federally funded student financial aid programs. An association of trade schools in New York[26] challenged the authority of the Secretary of Education and sought to block enforcement of a regulation that established procedures for refunding student and government funds if a student withdraws from, fails to enroll in, or is expelled during a course of study at a federally funded educational institution. The Second Circuit overturned a permanent injunction, remarking that the regulation was a reasonable interpretation of the HEA even though it did not allow institutions to retain amounts owed by students when calculating refunds under a state or accrediting agency formula. The court believed that nothing in the HEA precluded the Secretary from requiring institutions to refund a larger amount in certain cases. The court emphasized that the HEA did not dictate that the government, rather than an educational institution, should bear the risk of student nonpayment.

State officials also received support from the courts. In the first of two cases from New York, a student sought further review of his unsuccessful attempt to obtain tuition assistance under the state's Tuition Assistance Program (TAP). An appellate court affirmed the denial of the student's request on the ground that he was categorically ineligible for TAP awards during the academic years his parents claimed him as a dependent on their income tax returns.[27] In addition, the court ascertained that the appellant failed to disclose information from the Social Security Administration describing the nature of the category of his benefits.

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[23] 118 S. Ct. 909 [123 Educ. L. Rep. 1038] (1998).

[24] 42 U.S.C.A. § 1395ww(h).

[25] U.S.C.A. § 1070 et seq.

[26] Coalition of N.Y. State Career Schs. v. Riley, 129 F.3d 276 [122 Educ. L. Rep. 100] (2nd Cir. 1997).

[27] Sugantino v. New York St. Higher Educ. Serv. Corp., 664 N.Y.S.2d 813 [122 Educ. L. Rep. 766] (App. Div. 1997).

An appellate court in New York agreed with the state Higher Education Services Corporation's (HESC) action in requiring a licensed beauty school to review the records of all students who were certified as being in their second year of studies for the purposes of federal student loan programs and to submit their attendance records.[28] The court affirmed that the HESC's requirements were reasonable since the school violated federal student loan regulations when it miscertified the class year of some of its students.

In the only case favoring the plaintiff, the Seventh Circuit[29] found that while a plaintiff with a disability in Wisconsin did not have a private right of action under Title I of the Rehabilitation Act of 1973,[30] section 1983[31] allowed him to challenge a policy of the state division of vocational rehabilitation that disfavors funding a graduate school education. The plaintiff sought a continuation of his benefits so that he could enter law school.

Bankruptcy

A case from Missouri raised an interesting question about the Eleventh Amendment immunity of a state university and a student loan program where a debtor filed a complaint over the dischargeability of her student debts.[32] A federal trial court explained that Eleventh Amendment immunity protected the university and the loan program because Congress was not empowered to use its Article I authority under the Bankruptcy Clause to abrogate their immunity. Even so, the court permitted the parties to brief whether the student loan program waived its Eleventh Amendment immunity by filing a proof of claim in the debtors' bankruptcy case.

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[28] Calise Beauty Sch. v. New York St. Higher Educ. Serv. Corp., 666 N.Y.S.2d 839 [123 Educ. L. Rep. 826] (App. Div. 1997).

[29] Mallett v. Wisconsin Div. of Vocational Rehabilitation, 130 F.3d 1245 [122 Educ. L. Rep. 611] (7th Cir. 1997).

[30] 29 U.S.C.A. § 701 et seq.

[31] 42 U.S.C.A. § 1983.

[32] *In re* Rose, 214 B.R. 372 [122 Educ. L. Rep. 472] (Bankr. W.D. Mo. 1997).

Chapter 7

Cases addressing Chapter 7 bankruptcy generally sought to define the limits and conditions of the dischargeability of loans. The issues included the definition of a loan, time limits, and qualifications for undue hardship discharge.

On further review of a case from Tennessee, the Sixth Circuit reversed and remanded in ruling that where a total discharge was not warranted, the bankruptcy court had the power to fashion a remedy to allow debtors to satisfy their obligations while providing them some benefits that bankruptcy brings in relief from oppressive financial circumstances.[33]

At issue in this Chapter 7 case from Nebraska was when, for dischargeability purposes, the debtor's student loan became due. The Eighth Circuit posited that the debtor's student loan became due on the date that the first installment payment was due under the payment schedule after the expiration of the grace period.[34] However, according to the promissory note, the debtor had to first contact the lender. Insofar as the debtor made no effort to contact the lender, the court reflected that the lender could unilaterally establish the periodic installment date for beginning repayment of the loan and that for the purposes of determining dischargeability this second date was the definitive one.

When considering the merits of an undue hardship discharge of loans, the courts reached mixed results. The Ninth Circuit, in a case from Arizona, addressed whether a married couple qualified for an undue hardship discharge of the husband's student loans.[35] Adopting the three-part *Brunner* test,[36] the court affirmed that the debtors could not maintain a minimal standard of living and repay their student loans, that their unfortunate financial situation was likely to continue for a substantial portion of the repayment period, and that they had made a good-faith attempt to pay the loans.

The Tenth Circuit, in a case from Colorado, addressed whether a creditor's extension of the repayment period, at the debtor's request and based on the former's mistaken determination that the latter's loans had not become due, was an applicable suspension of the repayment period when calculating the seven-year dischargeability period under the bankruptcy code. The court concluded that the extension was an applicable suspension of the repayment period.[37]

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[33] *In re* Hornsby, 144 F.3d 433 [126 Educ. L. Rep. 643] (6th Cir. 1998).

[34] *In re* Scott, 147 F.3d 788 [127 Educ. L. Rep. 592] (8th Cir. 1998).

[35] *In re* Pena, 155 F.3d 1108 [129 Educ. L. Rep. 615] (9th Cir. 1998).

[36] *In re* Brunner, 831 F.2d 395 (2nd Cir. 1987).

[37] *In re* Woodcock, 144 F.3d 1340 [126 Educ. L. Rep. 691] (10th Cir. 1998).

A case from Kansas involved a student-loan debtor who failed to respond to a post-bankruptcy enforcement complaint. The federal trial court acknowledged that the debtor's alleged belief that a hearing date would have been set did not rise to the level of a mistake, inadvertence, surprise, or excusable neglect and that he failed to satisfy his burden of proving that he had a meritorious defense to a default judgment.[38]

In Connecticut, a bankruptcy court maintained that a debtor with only one dependent and an annual income of $35,000 failed to show that requiring him to repay his obligation on a student loan would result in an undue hardship.[39] However, a court in New York court granted an undue hardship discharge to a debtor who suffered from a bipolar mental disorder because she showed that her inability to repay her debt was likely to continue for a significant portion of the loan repayment period.[40]

A second bankruptcy court in New York contended that where a debtor entered into a consolidation loan with the same lender from which she obtained her original student loans, she could not obtain a discharge of her obligations unless she entered the consolidation agreement more than seven years before her Chapter 7 filing.[41] The court observed that the student could seek a discharge of her loan if she could show undue hardship.

The Supreme Court of Vermont asserted that a bankruptcy court had not discharged a student's loans in a Chapter 7 proceeding.[42] As such, the court noted that the doctrine of *res judicata* did not preclude the lender from bringing a default action against the debtor.

In a second case from Vermont, the federal bankruptcy court applied the *Brunner* test in decreeing that a debtor failed to satisfy the test's three prongs.[43] The court indicated that since the well-educated debtor's minimalist lifestyle was a matter of choice rather than necessity, he was unable to show that his lifestyle was likely to continue.

The federal bankruptcy court in Alaska considered the case of a former Chapter 7 debtor who sought to reopen his claim to obtain an interpretation of whether his obligations under a Health Education Assistance Loan (HEAL) were dischargeable. The court addressed whether the debtor was entitled to obtain an unconscionability discharge because he voluntarily assumed the legal obligation for his wife's medical expenses after the

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[38] United States v. Buford, 214 B.R. 394 [122 Educ. L. Rep. 479] (D. Kan. 1997).

[39] *In re* Stein, 218 B.R. 281 [125 Educ. L. Rep. 145] (Bankr. D. Conn. 1998).

[40] *In re* Doherty, 219 B.R. 665 [125 Educ. L. Rep. 676] (Bankr. W.D.N.Y. 1998).

[41] *In re* Hull, 223 B.R. 876 [128 Educ. L. Rep. 1076] (Bankr. W.D.N.Y. 1998).

[42] Vermont Student Assistance Corp. v. Zeichner, 708 A.2d 1351 [125 Educ. L. Rep. 702] (Vt. 1998).

[43] *In re* Lehman, 226 B.R. 805 [130 Educ. L. Rep. 803] (Bankr. D. Vt. 1998).

Chapter 7 discharge of his non-HEAL loans. The court permitted the debtor to seek an unconscionability discharge since it was unable to uncover evidence that he attempted to orchestrate such a result by marrying his wife.[44]

In Massachusetts, the federal bankruptcy court favored a focus on the substance of a transaction that created an obligation over a formulaic approach to defining a loan for purposes of a discharge exception. In so doing, the court mandated that where a debtor attended a university and promised to pay her tuition later, the arrangement constituted a loan within the meaning of a discharge exception for a student loan debt.[45]

A federal bankruptcy court in Kentucky considered when the seven-year period used to evaluate dischargeability begins. The debt involved the consolidation loan that first became due during the seven-year period used to calculate dischargeability under the law; however, the original loan became due during the prior controlling seven-year period. The court judged that the debtor could not file for bankruptcy and obtain a discharge of his obligation for any reason other than for showing an undue hardship.[46] The court added that once the consolidation loan extinguished the prior debt, the due date of the consolidation loan, not the due dates of the original loans, controlled the dischargeability of the debtor's obligation on the consolidation loan.

Interestingly, ostensible evidence of a debtor's bad faith did not prevent judges from awarding undue hardship discharges. A federal trial court in Oklahoma court was satisfied that the mere fact that a debtor did not offer any payments on some of her student loans did not show bad faith.[47] Accordingly, the court did not prevent the debtor from obtaining an undue hardship discharge of her student loan.

Chapter 13

In Missouri, a bankruptcy court was of the opinion that a college's extension of credit for tuition, books, and other educational expenses was a nondischargeable student loan. The court wrote that the loan was not dischargeable even though no exchange of cash occurred between the student and the college.[48]

A bankruptcy court in Pennsylvania commented that a Chapter 13 debtor satisfactorily showed that she was entitled to an undue hardship discharge of her student loans under the *Brunner* test.[49] The court offered that the debtor's inability to repay the loans without undue hardship was likely to persist for a significant portion of the loan repayment period, that at age 50 she was unable to obtain employment despite her "copious job applications," and that she could not work for the thirty years needed to repay her debt at the rate of $322.22 per month.

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[44] *In re* Lien, 224 B.R. 431 [128 Educ. L. Rep. 1080] (Bankr. D. Alaska 1998).

[45] *In re* DePasquale, 225 B.R. 830 [130 Educ. L. Rep. 216] (B.A.P. 1st Cir. 1998).

[46] *In re* Mattingly, 226 B.R. 583 [130 Educ. L. Rep. 1269] (Bankr. W.D. Ky. 1998).

[47] *In re* Coats, 214 B.R. 397 [122 Educ. L. Rep. 482] (Bankr. N.D. Okla. 1997).

[48] *In re* Johnson, 215 B.R. 750 [123 Educ. L. Rep. 227] (Bankr. E.D. Mo. 1997).

[49] *In re* Young, 225 B.R. 312 [129 Educ. L. Rep. 681] (Bankr. E.D. Pa. 1998).

Service Contracts

The federal trial court in Massachusetts granted a motion for summary judgment filed by a law school and the state's Educational Financing Authority when a graduate claimed that school officials wrongfully denied him assistance under the institution's low-income protection program.[50] According to the court, the law school did not have a contractual obligation to provide loan repayment assistance to the graduate when he took a job as a political reporter for a foreign newspaper.

Collection

The federal trial court for the District of Columbia court rejected a student loan recipient's efforts to abrogate her responsibilities under the Guaranteed Student Loan (GSL) program because her for-profit vocational school failed to meet accreditation standards and failed to deliver promised educational training.[51] Among the points that it made in its complex decision, the court observed that the school's loss of accreditation to participate in a GSL program did not affect the enforceability of student loans that were made before the institution lost its accreditation. Conversely, the Supreme Court of Idaho affirmed a borrower's claim that he satisfied his student loans and his allegations of defamation against a debt collector.[52]

In the first of two New York cases, an appellate court considered a plaintiff's claim that the parents of two college aged daughters promised to repay the tuition advances he made for their daughters. When the parents refused to repay the loan, the plaintiff sued for breach of contract, unjust enrichment, and indemnity. The court discerned that since the parents could not perform the alleged oral promise within one year, had no terms mandating payments or a repayment schedule, and did not guarantee that their daughters would remain in college, the alleged promise did not come within the statute of frauds.[53] However, although the daughters were beneficiaries of the alleged agreement, the court pointed out that the plaintiff adequately presented a claim for unjust enrichment against the parents.

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[50] Thornton v. Harvard Univ., 2 F. Supp.2d 89 [127 Educ. L. Rep. 95] (D. Mass. 1998).

[51] Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 980 F. Supp. 53 [122 Educ. L. Rep. 660] (D.D.C. 1997).

[52] Student Loan Fund of Idaho, Inc. v. Duerner, 951 P.2d 1272 [124 Educ. L. Rep. 413] (Idaho 1997).

[53] Nakamura v. Fujii, 677 N.Y.S.2d 113 [128 Educ. L. Rep. 1158] (App. Div. 1998).

In the second case, an appellate court in New York affirmed that federal law preempted the disclosure provisions of state banking law with respect to student loans guaranteed by the HEA.[54] Thus, the court agreed that the lender's alleged failure to comply with state requirements could not provide a defense in an action to recover on a promissory note for a loan.

A federal trial court in Tennessee ruled in favor of a state agency that was created to guarantee and administer student assistance programs and a student-loan servicing corporation for alleged violations of the Fair Debt Collection Practices Act (FDCPA).[55] The court declared that neither the state agency nor the loan servicing corporation was a debt collector under the FDCPA because both began providing preclaims assistance before the student's loan was in default.[56]

Criminal Prosecution

In the only reported case involving criminal prosecution, former students from a proprietary vocational school in Arizona claimed that officials committed fraud and engaged in racketeering in light of their failure to provide education, training, housing, and job placement services. The federal trial court held that a bank's processing of student loan applications did not implicate it with the school's allegedly fraudulent actions.[57]

Student Organizations

Students in organizations continued to push for greater freedom under the First Amendment, state and federal freedom of information statutes, open meetings laws, and other constitutional and statutory principles. The past year's cases generally did not favor the students.

First Amendment

Freedom of Speech

In cases involving journalists, the courts decided that federal laws designed to protect the confidentiality of student records generally should prevail. When a reporter for a radio station sought documents from a university under the state's Freedom of Information Act, an appellate court in Michigan affirmed a grant of summary judgment in favor of the university.[58] The court was of the view that disclosure of the information from the file of a student on athletic scholarship regarding a car he was driving when involved in a car accident would have put the university out of compliance with the Family Educational Rights and Privacy Act (FERPA).[59]

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[54] New York State Higher Educ. Serv. Corp. v. Perchik, 677 N.Y.S.2d 871 [129 Educ. L. Rep. 746] (App. Div. 1998).

[55] 15 U.S.C.A. § 1692 et seq.

[56] Jones v. InTuition, Inc., 12 F. Supp.2d 775 [129 Educ. L. Rep. 199] (W.D. Tenn. 1998).

[57] Kearns v. Tempe Tech. Inst., 993 F. Supp. 714 [125 Educ. L. Rep. 394] (D. Ariz. 1997).

A newspaper editor at a university in North Carolina unsuccessfully sought to attend a student disciplinary hearing of its undergraduate court on the basis that the undergraduate court was a public body that was subject to the state's Open Meetings Law. An appellate panel affirmed that the undergraduate court had the right to conduct hearings in a closed session under both FERPA and its state counterpart in order to protect confidential student records.[60]

Journalists prevailed in one case despite the apparent injury to a university official's name. A university official failed in her attempt to sue an on-campus newspaper for common law defamation, defamation *per se*, and the use of insulting words after it printed a description of her as "Director of Butt Licking." The Supreme Court of Virginia affirmed that while the phrase is "disgusting, offensive, and in extremely bad taste," it is no more than "rhetorical hyperbole" and that no one could reasonably understand it as establishing a fact about the official's job title, her conduct, or that she committed a crime of moral turpitude.[61]

The courts continued to protect mandatory student fees from use by political organizations. In a case from Wisconsin, the Seventh Circuit invalidated a state university's practice of using mandatory student fees to support a private organization that engaged in political and ideological activities.[62] The court found that the university's practice violated the free speech rights of students who objected to those political and idealogical activities.

Freedom of Religion

In the only reported case involving a freedom of religion claim, students who objected on religious grounds to living in coeducational residence halls failed to convince the federal trial court in Connecticut that the university's housing policy violated the Fair Housing Act,[63] the Sherman Antitrust Act,[64] and various state laws. The court remarked that the Fair Housing Act did not impose a duty on the university to make a reasonable accommodation for the religious beliefs of students who objected to living in coeducational residence halls because the reasonable accommodation provision of the law pertains only to discrimination against individuals with disabilities.[65]

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[58] Connoisseur Comm. v. University of Mich., 584 N.W.2d 647 [129 Educ. L. Rep. 792] (Mich. Ct. App. 1998).

[59] 20 U.S.C.A. § 1232g.

[60] DTH Publ'g Corp. v. University of N.C. at Chapel Hill, 496 S.E.2d 8 [123 Educ. L. Rep. 1301] (N.C. Ct. App. 1998).

[61] Yeagle v. Collegiate Times, 497 S.E.2d 136 [124 Educ. L. Rep. 735] (Va. 1998).

[62] Southworth v. Grebe, 151 F.3d 717 [128 Educ. L. Rep. 624] (7th Cir. 1998).

Discipline

Nonacademic Disciplinary Action

When college and university officials discipline students for nonacademic reasons, the courts generally defer as long as the processes comport with their own rules and regulations and are consistent with the due process requirements of state and federal law. The Eighth Circuit considered the case of a student from Arkansas who was expelled from nursing school after she pled *nolo contendere* to a misdemeanor offense of trying to obtain a controlled substance with a fraudulent prescription. The court affirmed that the college's standards of conduct were sufficiently precise to inform the student that her criminal act involved unacceptable behavior that could lead to expulsion.[66] In addition, the court ascertained that the college provided the former student with sufficient procedural due process.

In the first of two cases from Florida, an appellate court upheld an adjudication of a university's judicial appeals committee that a student violated the code of conduct code by setting fire to model ships in a student residence.[67] However, in the second case from Florida, an appellate court believed that a university's imposition of discipline against a student for assault and battery was invalid because the hearing panel failed to make a determination that his conduct was unlawful.[68]

A criminal court in Oklahoma had to distinguish punishment for purposes of double jeopardy. Here the defendant failed to prove that criminal proceedings for falsely reporting a car-jacking constituted double jeopardy because the university already punished him for the offense.[69] The court reasoned that the university's imposition of probation and community service was not a form of punishment that presented a double-jeopardy bar to prosecution.

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[63] 42 U.S.C.A. § 3604.

[64] 15 U.S.C.A. §§ 1 & 2.

[65] Hack v. President & Fellows of Yale College, 16 F. Supp.2d 183 [129 Educ. L. Rep. 1020] (D. Conn. 1998).

[66] Woodis v. Westark Community College, 160 F.3d 435 [130 Educ. L. Rep. 518] (8th Cir. 1998).

[67] Abramson v. Florida Int'l Univ., 704 So. 2d 720 [123 Educ. L. Rep. 428] (Fla. Dist. Ct. App. 1998).

[68] Hardison v. Florida Agric. & Mech. Univ., 706 So. 2d 111 [124 Educ. L. Rep. 476] (Fla. Dist. Ct. App. 1998).

When institutional officials failed to observe basic constitutional protections, the courts acted to protect the rights of students. Where officials at a university in Louisiana expelled a student for drug possession, an appellate court affirmed that its dormitory sweep policy violated the Fourth Amendment rights of students who lived on campus.[70] The court asserted that the university's broadly worded rental agreement that allowed for unreasonable warrantless police searches was unconstitutional because it had other ways to promote the safety interests of students.

In the first of two cases from Texas, an appellate court affirmed that a student was not entitled to prior notice before her car was towed.[71] The court reflected that although the student had a valid handicap-parking permit, she forgot to display it when she parked in a designated space for individuals with disabilities on campus.

The second case from Texas concerned a more serious student infraction. Parents of minor children sued a university alleging that one of its students photographed and videotaped their children in explicit sexual poses in his dormitory room.[72] On appeal, the court dismissed the action against the university in stating that even if university officials had some knowledge that the student was a suspected pedophile, its failure to use the information to prevent him from taking illegal photographs of minors in his dormitory and its continuing to rent him a room did not involve the use of real property within the meaning of state law. Therefore, the court was convinced that the student, not the dormitory room, caused injury to the children.

A female student in Virginia who was expelled for sexually harassing two male faculty members sued them and the dean under title IX[73] and section 1983. A federal trial court, in granting motions in favor of the defendants, noted that one faculty member and the dean were entitled to qualified immunity for their alleged deprivation of the student's right to free speech during the disciplinary hearing that led to her expulsion.[74] The court decreed that the two defendants could reasonably have viewed

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[69] State of Oklahoma v. Kauble, 948 P.2d 321 [122 Educ. L. Rep. 838] (Okla. Crim. App. 1997).

[70] Devers v. Southern Univ., 712 So. 2d 199 [127 Educ. L. Rep. 477] (La. Ct. App. 1998).

[71] Corkery v. Texas Christian Univ., 955 S.W.2d 424 [122 Educ. L. Rep. 854] (Tex. Ct. App. 1997).

[72] Lamar Univ. v. Doe, 971 S.W.2d 191 [127 Educ. L. Rep. 1124] (Tex. Ct. App. 1998).

[73] 20 U.S.C. § 1681, et seq.

[74] Litman v. George Mason Univ., 5 F. Supp.2d 366 [127 Educ. L. Rep. 790] (E.D. Va. 1998).

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the student's actions of sending many e-mail messages and other correspondence to her professors over her claims of sexual harassment as highly disruptive of the faculty members' work.

Academic Discipline

Courts continue to be reluctant to insert themselves in the academic process unless officials at colleges and universities act arbitrarily, capriciously, in bad faith, or beyond the scope of their employment. When officials appeared to abuse or overstep their authority, courts protected the students. Judges were especially intolerant of officials who acted inconsistently with their own policies and regulations. Finally, courts continued to reject attempts to establish a cause of action for educational malpractice.

Breach of Contract

In the first of four cases from New York, a student at a community college obtained an injunction barring the school from preventing him and other qualified individuals from taking part in graduation ceremonies and receiving diplomas. The case challenged officials who deviated from the college system's policy and allowed students to enter an English course without taking a mandatory writing assessment test. A trial court explained that the student satisfied course requirements and prerequisites that the college had established and relied on the policy as announced by its faculty and administrators who allowed the waiver for the writing test.[75]

An appellate court in New York rejected a plaintiff's attempt to certify thirty-five students as a class in his breach of contract against a university orthodontics program for failing to provide educational services.[76] In the third case from New York, an appellate court posited that lack of subject matter jurisdiction was a nonwaivable defense that could be raised at any stage in a suit.[77]

The fourth case from New York involved a former dental student's unsuccessful attempt to convince a federal trial court to create a cause of action for constructive discharge from education.[78] The court followed the lead of other courts in New York that refused to entertain actions sounding in educational malpractice because to do so would undermine the existing legal framework and run counter to important policy considerations.

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[75] Mendez v. Reynolds, 665 N.Y.S.2d 402 [122 Educ. L. Rep. 1046] (Sup. Ct. 1997).

[76] Ansari v. New York Univ., 179 F.R.D. 112 [126 Educ. L. Rep. 1043] (S.D.N.Y. 1998).

[77] Gelin v. Lehman College, 679 N.Y.S.2d 12 [130 Educ. L. Rep. 231] (App. Div. 1998).

[78] Gally v. Columbia Univ., 22 F. Supp.2d 199 [130 Educ. L. Rep. 755] (S.D.N.Y. 1998).

In Illinois, a doctoral student challenged a judgment in her breach of contract suit against her university. An appellate court affirmed that a student failed to show that the university breached an implied contract when it refused to award her a Ph.D. degree.[79]

An appellate court in Texas affirmed judicial deference to the discretionary authority of a faculty's professional judgment in a case involving a nursing student who failed a required course and could not receive her degree.[80] The court acknowledged that the student's failure to pass a required course did not satisfy her obligations under an implied contract with her university. The court refused to second-guess the faculty's evaluation process and characterized the student's attempts to reassess her grade as merely speculation.

In New Jersey, an appellate court affirmed a grant of summary judgment in favor of a university that dismissed a dental student for poor academic performance.[81] The court indicated that it would not rigidly apply contract principles to a university-student conflict, that the dismissal procedures were consistent with the university's rules and regulations, and that the plaintiff failed to file notice of his tort claims within the legal deadline.

Due Process

An appellate court in Florida affirmed the authority of a university committee that failed a doctoral candidate on his oral examination.[82] The court agreed that the candidate's subjective opinion that he did not deserve a failing grade was insufficient to justify his failure to exhaust his administrative remedies. The court added that the candidate could retake the examination after a one-year lapse.

In Indiana, a student failed to prevent his expulsion from law school for alleged violations of his right to due process and breach of contract. An appellate court affirmed that university officials had the authority to expel the student because he misrepresented himself on his application and his résumé.[83]

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[79] Bilut v. Northwestern Univ., 692 N.E.2d 1327 [125 Educ. L. Rep. 761] (Ill. App. Ct. 1998).

[80] Southwell v. University of Incarnate Word, 974 S.W.2d 351 [128 Educ. L. Rep. 1294] (Tex. Ct. App. 1998).

[81] Mittra v. University of Med., 719 A.2d 693 [130 Educ. L. Rep. 823] (N.J. Super. Ct. App. Div. 1998).

[82] Montalvo v. University of Miami, 705 So. 2d 1042 [124 Educ. L. Rep. 474] (Fla. Dist. Ct. App. 1998).

[83] Gagne v. Trustees of Ind. Univ., 692 N.E.2d 489 [124 Educ. L. Rep. 1030] (Ind. Ct. App. 1998).

A federal trial court in Nebraska held that a student's dismissal from a postgraduate program in orthodontics did not violate his right to procedural due process although a grade appeal hearing was not recorded as required.[84] The court concluded that the action to dismiss was careful and deliberate in commenting that the student received repeated warnings of the faculty's dissatisfaction and of the possibility of his dismissal.

In two cases from New York, students failed to secure reinstatement. In the first, an appellate court rejected a nursing student's petition challenging his expulsion for plagiarism. The court was satisfied not only that the student received adequate notice of a hearing on charges of plagiarism but also that university officials substantially complied with published guidelines for such hearings.[85] The court added that a verbatim record of the hearing was not required.

The second case from New York involved the court's deference to the decision-making of academic officials when it rejected a former medical student's Article 78 petition to compel his reinstatement.[86] The court declared that the university's action in dismissing the student was properly based on academic considerations that were neither arbitrary nor capricious.

A third New York case involved a suit filed by a student who sued her community college to recover tuition and to revise her grade point average. The student claimed that college officials forced her to drop a mathematics class after the semester started. In dismissing her suit, a trial court maintained that insofar as she had not requested a refund in writing within the appropriate time frame, the student had to file her request for one in small claims court.[87] Moreover, the court pointed out that it lacked the jurisdiction to grant injunctive relief to compel college officials to honor the student's request to revise her grade point average.

Racial Discrimination

In Tennessee, the Sixth Circuit rejected a former student's multiprong attempt to sue his university for alleged discrimination based on national origin, physical disability, and speech. The former dental student, a native of Iran, was unable to persuade the court that his conduct of disrupting the educational process by refusing to move from the back row of the classroom was protected speech.[88] Instead, the court characterized his protest of the classroom rule prohibiting first-year dental students from sitting in the last row of certain classes as a power struggle.

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[84] Rossomando v. Board of Regents of Univ. of Neb., 2 F. Supp.2d 1223 [127 Educ. L. Rep. 142] (D. Neb. 1998).

[85] Trahms v. Columbia Univ., 666 N.Y.S.2d 150 [122 Educ. L. Rep. 1263] (App. Div. 1997).

[86] Williams v. State Univ. of N.Y., 674 N.Y.S.2d 702 [127 Educ. L. Rep. 960] (App. Div. 1998).

[87] Carren v. Westchester County Community College, 674 N.Y.S.2d 576 [127 Educ. L. Rep. 954] (City Ct. 1998).

The federal trial court in Maryland observed that an African-American student failed to support her multiple claims of race and gender discrimination when she was dismissed from a doctoral program.[89] The court contended that the student was unable to demonstrate her qualification to remain in the program after she had failed to complete two mandatory qualifying examinations by the end of her third year of study. Conversely, a trial court in New York rejected a motion for summary dismissal where a law student alleged racial discrimination in the way a professor and an academic standing committee handled his grade appeal.[90]

Disability Laws

In two reported cases, academic standards prevailed over alleged violations of federal laws designed to protect students with disabilities. Further, the courts also rejected the notion that students with disabilities can dictate what constitutes reasonable accommodations. A nursing student from Massachusetts alleged multiple violations of the Americans with Disabilities Act[91] (ADA), Section 504 of the Rehabilitation Act,[92] and title IX based on her pregnancy. Although the court was of the opinion that while the student's condition was a disability within the meaning of the ADA, the university met its obligation by offering her a reasonable accommodation.[93] The court upheld the student's failing grade on the ground that she did not meet the legitimate educational expectations of her clinical and classroom instructors.

Where a student with a disability was expelled for cheating and plagiarism, a federal trial court in Virginia ruled that he was not otherwise qualified to fill the position of a graduate student in a criminal justice program.[94] The court rejected the student's claim that his disability rendered him incapable of citing material properly or understanding the requirement that he could not submit papers for credit in more than one course without prior permission. Moreover, the court rebuffed the notion that waiving the university's honor code was a reasonable accommodation of the student's disability.

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[88] Salehpour v. University of Tenn., 159 F.3d 199 [130 Educ. L. Rep. 418] (6th Cir. 1998).

[89] Middlebrooks v. University of Md., 980 F. Supp. 824 [122 Educ. L. Rep. 699] (D. Md. 1997).

[90] Davis v. Goode, 995 F. Supp. 82 [125 Educ. L. Rep. 664] (E.D.N.Y 1998).

[91] 42 U.S.C.A. § 12101, et seq.

[92] 29 U.S.C.A. § 794, et seq.

[93] Darian v. University of Mass. Boston, 980 F. Supp. 77 [122 Educ. L. Rep. 676] (D. Mass. 1997).

[94] Childress v. Clement, 5 F. Supp.2d 384 [127 Educ. L. Rep. 804] (E.D. Va. 1998).

Federal Statutes

Consistent with the past, students frequently used federal laws to challenge the actions of officials at state institutions. The degree of success that students have depended largely on the facts in their cases and to the federal laws on which they based their causes of action.

Section 1983

A case from Pennsylvania addressed whether a varsity football player on an athletic scholarship at a public university who attacked and injured a referee during a game acted under color of state law for purposes of section 1983. A federal trial court discerned that while the university was a state actor for the purposes of section 1983, the player did not act under color of state law as measured by either the symbiotic relationship, nexus, or public function approaches.[95]

Title VI[96]

The Eighth Circuit decided that an African-American student in Missouri who was dismissed for failing to pay his fees was not precluded from relying on title VI as the basis for his claim.[97] Reversing in favor of the student, the court remarked that Eleventh Amendment sovereign immunity could not bar his title VI damages claim and that he raised a triable issue of fact concerning the university's alleged pretext in its stated reason for terminating his enrollment.

Violence Against Women Act[98]

A case from Virginia added another step to a female student's long-term effort to sue her rapists under the Violence Against Women Act (VAWA) and the university under title IX. The Fourth Circuit[99] reversed two trial court judgments[100] in mandating that title VII standards are applicable to hostile environment claims under title IX, that the student alleged sufficient facts to state a hostile environment claim under title IX, and that she stated a claim under the VAWA.

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[95] Indorato v. Patton, 994 F. Supp. 300 [125 Educ. L. Rep. 473] (E.D. Pa. 1998).

[96] 42 U.S.C.A. § 2000d et seq.

[97] Fuller v. Rayburn, 161 F.3d 516 [130 Educ. L. Rep. 1089] (8th Cir. 1998).

[98] 42 U.S.C.A. § 13981 (1994).

[99] Brzonkala v. Virginia Polytechnic Inst., 132 F.3d 949 [122 Educ. L. Rep. 1193] (4th Cir. 1997).

[100] Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 [112 Educ. L. Rep. 846] (W.D. Va. 1996); Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 772 [112 Educ. L. Rep. 839] (W.D. Va. 1996).

Title IX

Title IX litigation fell into two general areas. In the first, female students pursued equitable treatment or program resources while in the second they sought to punish officials for alleged sexual harassment.

A student in Alabama sued her university for an athletic scholarship that officials promised, but did not deliver, where there was a lack of available funds for the volleyball program. A federal trial court held that the university voluntarily waived Eleventh Amendment immunity because the spending clause of the Constitution empowers Congress to require states to do so when they accept and use federal funds.[101] However, the court subsequently refused to permit the student to sue the university in light of procedural reasons.[102]

In the first of two cases from New York, students filed a title IX suit that secured recognition of women's ice hockey as a varsity sport. Even so, the court reduced the attorney fees that the students received by 30% in determining that the number of hours charged had to be adjusted since there was duplication of duties, work done by overqualified personnel, and excessive time claimed to perform tasks.[103]

The second suit from New York considered whether title IX protects a biological male who was subjected to discriminatory conduct because he was perceived as a female. The case involved a graduate student who was admitted to a university as a female but was in fact a male-to-female transsexual who was in the process of becoming a woman at the time of the alleged sex-related discrimination. A federal trial court believed that the student alleged sufficient facts to support a title IX claim and, in scathing language, rejected the university's motion for summary judgment wherein it claimed that it was not responsible for the conduct of a faculty member who forced the student to leave a doctoral program.[104]

In Pennsylvania the issue arose of whether the National Collegiate Athletic Association (NCAA) qualified as a recipient of federal funds and was thus subject to the mandates of title IX. A student in a postbaccalaureate program challenged the NCAA's enforcement of a bylaw that prohibits student-athletes from participating in intercollegiate athletics at a postgraduate institution other than the one from which they obtained their undergraduate degrees. A federal trial court rejected the student's claim that the NCAA qualifies as a recipient of federal funds, finding that while individual student-athletes may receive federal financial aid, the NCAA does not administer any federal aid.[105] Moreover, the court posited that even if the NCAA were, in some sense, a recipient of federal funds, the connections present to reach that status were too attenuated to qualify it as a recipient without a statutory connection between it and member schools that designated the NCAA as their agent. On appeal, the Third Circuit vacated and remanded in reasoning that the student was entitled to amend her complaint regarding the allegation that the NCAA received federal financial assistance.[106]

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[101] Beasley v. Alabama St. Univ., 3 F. Supp.2d 1304 [127 Educ. L. Rep. 239] (M.D. Ala. 1998).

[102] Beasley v. Alabama St. Univ., 3 F. Supp.2d 1325 [127 Educ. L. Rep. 260] (M.D. Ala. 1998).

[103] Bryant v. Colgate Univ., 996 F. Supp. 170 [125 Educ. L. Rep. 1237] (N.D.N.Y. 1998).

[104] Miles v. New York Univ., 979 F. Supp. 248 [122 Educ. L. Rep. 452] (S.D.N.Y. 1997).

A federal trial court in California decreed that a faculty member's explicit comments about his sex life, in combination with one kiss on a student's cheek in public, did not rise to the level of creating a hostile, intimidating, or abusive educational environment.[107] As such, the court refused to permit the student's case to proceed.

The Tenth Circuit, in a case from Colorado, addressed whether, for evaluating a university's potential for liability under title IX liability for alleged sexual harassment by Reserve Officer Training Corps (ROTC) cadets and instructors, one can reasonably assume that students and instructors in the ROTC program are subject to university control.[108] The court reversed an earlier dismissal and remanded for further consideration because the plaintiffs adequately alleged all elements of a cause of action against the university under title IX.

In Ohio, a female doctoral student who completed a practicum claimed that she had been sexually harassed by her supervisor. The court was not convinced either that the supervisor faced individual liability under title IX or that his alleged misconduct was outrageous and shocking enough to substantiate her claim of violating substantive due process and that the student failed to establish a *prima facie* case of *quid pro quo* or hostile environment sexual harassment.[109]

In Virginia, a student sued her university for allegedly violating title IX over its response to her having been raped.[110] The court rejected the university's motion to dismiss in stating that the Eleventh Amendment did not immunize it from the student's title IX claim because Congress expressly authorized suits against states under the Education Amendments.[111]

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[105] Smith v. NCAA, 978 F. Supp. 213 [122 Educ. L. Rep. 171] (W.D. Pa. 1997).

[106] Smith v. NCAA, 139 F.3d 180 [125 Educ. L. Rep. 32] (3rd Cir. 1998).

[107] Gallant v. Board of Trustees of Cal. State Univ., 997 F. Supp. 1231 [126 Educ. L. Rep. 238] (N.D. Cal. 1998).

[108] Morse v. Regents of Univ. of Colo., 154 F.3d 1124 [129 Educ. L. Rep. 71] (10th Cir. 1998).

[109] Petrone v. Cleveland St. Univ., 993 F. Supp. 1119 [125 Educ. L. Rep. 439] (N.D. Ohio 1998).

[110] Thorpe v. Virginia St. Univ., 6 F. Supp.2d 507 [128 Educ. L. Rep. 114] (E.D. Va. 1998).

Disability Laws

Americans with Disabilities Act

Where a student in Ohio who was diagnosed with a learning disability was dismissed from a podiatry program, she alleged that her medical college violated the ADA and Section 504 of the Rehabilitation Act of 1973 for failing to offer her a reasonable accommodation. The Sixth Circuit disagreed in asserting that the college did not have to modify standards when accommodating individual students with disabilities.[112] In addition, the court granted deference to the academic judgments of the college in reflecting that it made sufficient accommodations even though the student requested further modifications.

In an ongoing class action suit by students, the federal trial court in Massachusetts deferred to the discretion of university officials by refusing to order them to make course substitutions for the foreign language requirement.[113] The court ascertained that the university adequately considered alternate ways of accommodating the students' learning disabilities, that its denial of the course substitutions was a product of professional, academic judgment, that the requested change would have fundamentally altered the nature of the degree program, and that the university's refusal to make the alteration did not violate its obligation to provide reasonable accommodation for students with learning disabilities. Even so, in a separate judgment, the same court concluded that the university was liable for attorney fees and costs.[114]

A student in Missouri failed to convince a federal trial court that his university and the NCAA violated the ADA.[115] The student claimed that he suffered from a generalized anxiety disorder with a specific phobia related to testing situations that prevented him from scoring high enough on the ACT to meet NCAA eligibility requirements. The court denied the student's request for a preliminary injunction since he had not established the substantial likelihood of success on his claims.

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[111] 20 U.S.C.A. §§ 1681–1688.

[112] Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432 [131 Educ. L. Rep. 48] (6th Cir. 1998).

[113] Guckenberger v. Boston Univ., 8 F. Supp.2d 82 [128 Educ. L. Rep. 172] (D. Mass. 1998).

[114] Guckenberger v. Boston Univ., 8 F. Supp.2d 91 [128 Educ. L. Rep. 181] (D. Mass. 1998).

[115] Tatum v. NCAA, 992 F. Supp. 1114 [125 Educ. L. Rep. 134] (E.D. Mo. 1998).

In New Jersey, when the NCAA declared a first-year athlete a nonqualifier, he sued it for allegedly violating the ADA and a state antidiscrimination statute. The federal trial court noted that the university failed to show that it sufficiently accommodated the needs of students with learning disabilities as they tried to meet core course requirements.[116] The court held that the NCAA operated as a place of public accommodation within the meaning of the ADA and that questions of fact existed over whether the NCAA had discriminated against the student in its declaration that he was ineligible to participate in intercollegiate athletics.

National Voter Registration Act[117]

In reversing a trial court ruling from Virginia, the Fourth Circuit observed that the National Voter Registration Act requires states to designate state-funded offices that provide services to disabled students at public colleges and universities as voter registration agencies.[118] The court also explained that offices providing services to disabled students at public colleges are offices as defined within the Act.

Torts

Students asked courts to address a variety of personal injury suits during the past year. The courts were particularly careful not to defer to officials at colleges and universities when considering homicides.

The Supreme Court of Arkansas reversed a grant of summary judgment in a case involving the suicide of a student-athlete.[119] The court held that genuine issues of material fact existed as to whether the dispensation of controlled drugs to university athletes was implicated in his death.

In a second case involving a student suicide, the Supreme Court of Rhode Island reversed a grant of summary judgment in favor of a university.[120] According to the court, legally sufficient evidence existed in the record to support a decision that a university psychologist negligently failed to refer the student to someone qualified in suicide prevention.

Judicial action over the liability of institutional officials generally reflected their degrees of negligence. As in earlier cases, the facts influenced the results. However, in at least one case, an appellate court upheld the principle that where officials have knowledge of an existing danger, they are liable if they fail to make good-faith efforts to protect students.

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[116] Bowers v. NCAA, 9 F. Supp.2d 460 [128 Educ. L. Rep. 670] (D.N.J. 1998).

[117] 42 U.S.C.A. § 1973gg–5(a)(2)(B).

[118] National Coalition for Students v. Allen, 152 F.3d 283 [128 Educ. L. Rep. 960] (4th Cir. 1998).

[119] Wallace v. Broyles, 961 S.W.2d 712 [124 Educ. L. Rep. 739] (Ark. 1998).

As such, a student in Florida successfully proved that her university had a duty to protect her from sexual assault when she was participating in a mandatory off-campus internship. The court reversed a grant of summary judgment in favor of the university in maintaining that the student raised sufficient allegations against officials over their negligence because they knew that several other criminal incidents occurred at or near the location where she was attacked.[121]

A student in Louisiana who was raped by the director of the culinary apprenticeship program at her community college successfully established on appeal that the college was liable for her injuries.[122] An appellate court indicated that the college negligently hired the director without checking his criminal history, that the state was vicariously liable for the rape because the director committed the tort while acting in the course and scope of his employment, and that the lowest award to which the student was entitled was $100,000.

The death of a college student in Massachusetts led the administrator of her estate to sue a college and several of its medical personnel for malpractice.[123] An appellate court rejected the plaintiff's attempt to add the director of the health services department as a defendant where the evidence failed to show that the director deviated from proper medical procedure by not flagging the student's medical file for the condition she developed after enrolling at the college.

Three cases from New Jersey supported the common law and statutory immunity of educational institutions in unrelated slip-and-fall injuries. In the first action, a university challenged the denial of its motion for a directed verdict when it was sued by a student who slipped and injured himself in a pub that it operated on campus. An appellate court reversed in favor of the university.[124] The panel rejected the trial court's analysis that the university lost its statutory immunity since the pub did not further religious, charitable, or educational purposes.

In the second case, a state university sought further review of the denial of its motion for summary judgment where a student slipped and fell on ice in the parking lot of one of its dormitories. An appellate court in New Jersey reversed in writing that the university did not lose its common law snow removal immunity under the circumstances.[125]

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[120] Klein v. Solomon, 713 A.2d 764 [128 Educ. L. Rep. 280] (R.I. 1998).

[121] Gross v. Family Serv. Agency, Inc., 716 So. 2d 337 [128 Educ. L. Rep. 1346] (Fla. Dist. Ct. App. 1998).

[122] Harrington v. Louisiana St. Bd. of Elementary & Secondary Educ., 714 So. 2d 845 [128 Educ. L. Rep. 531] (La. Ct. App. 1998).

[123] Haywood v. Rechen, 696 N.E.2d 549 [127 Educ. L. Rep. 397] (Mass. App. Ct. 1998).

[124] Bloom v. Seton Hall Univ., 704 A.2d 1334 [123 Educ. L. Rep. 782] (N.J. Super. Ct. App. Div. 1998).

[125] Sykes v. Rutgers, 705 A.2d 1241 [124 Educ. L. Rep. 341] (N.J. Super. Ct. App. Div. 1998).

The third case from New Jersey is interesting because of the academic context in which the student's injury occurred. After watching a vivisection of an anesthetized laboratory rat, the plaintiff left the room and fainted in the hallway, suffered two broken teeth, a split gum, and received ten stitches. The student unsuccessfully alleged that the college and her professor were responsible for her fall and injuries. An appellate court affirmed that both the college and the faculty member were immune from legal action.[126] The court offered that the college's immunity arose from the state's charitable immunity statute because the student was a beneficiary of its educational works at the time of her injury while the professor was protected under state law as an employee of an immune public entity.

A mother visiting her daughter in her dormitory room slipped and fell. An appellate court in Louisiana affirmed that the student was 25% at fault because she failed to warn her mother the floor was wet due to a leaking air conditioner and the university was 75% liable because it failed to respond to the student's complaints about a leak.[127]

In the first of three cases from New York, an appellate court affirmed the denial of a college's motion to dismiss a suit filed by a student who sought to recover for the injuries that she sustained in a fall on a walkway while attending classes on the campus of another institution.[128] The court posited that while the college submitted documentary evidence that it did not own the property on which the fall occurred, it failed to establish conclusively that it had no control over or responsibility for maintenance of the common area at which it took place.

Where a student lost an eye while sledding on property owned by a Faculty-Student Association of a state university, an appellate court affirmed that he could not sue it because it was a private corporation.[129] The court pointed out that the state's recreational use statute immunized the Association from liability for injuries arising from students' free use of its property for sledding.

A student who slipped and fell on campus successfully raised a genuine issue of fact regarding whether the university cleared snow and slush from its campus sidewalks within a reasonable time after the end of a snow storm.[130] As such, the court affirmed the denial of the university's motion for summary judgment.

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[126] Graber v. Richard Stockton College, 713 A.2d 503 [127 Educ. L. Rep. 90] (N.J. Super. Ct. App. Div. 1998).

[127] Varnell v. Louisiana Tech. Univ., 709 So. 2d 890 [126 Educ. L. Rep. 543] (La. Ct. App. 1998).

[128] Smuckler v. Mercy College, 663 N.Y.S.2d 869 [122 Educ. L. Rep. 269] (App. Div. 1997).

[129] Heminway v. State Univ. of N.Y., 665 N.Y.S.2d 493 [122 Educ. L. Rep. 1050] (App. Div. 1997).

[130] Polgar v. Syracuse Univ., 680 N.Y.S.2d 132 [130 Educ. L. Rep. 1304] (App. Div. 1998).

In a case from Texas involving a student who was permanently blinded in one eye during a paint-ball war game, an appellate court ascertained that the conduct of nonparticipants in a contact sport is judged on the same basis as ordinary negligence. In so doing, the court reversed a grant of summary judgment that had been entered in behalf of a college fraternity because there was a genuine issue of material fact over whether it and its president breached their duty of ordinary care to participants when it organized and sponsored the paint-ball war game.[131]

A university in Wisconsin challenged a judgment in favor of a student resident advisor who was attacked off campus by a student who had recently been expelled. An appellate court reversed in favor of the university.[132] The court declared that even if the university had been negligent in its work assignment to the student, the imposing of liability on it was precluded by public policy considerations including the fact that the cause of the student's injuries were too remote from the university's alleged negligence and that if the court allowed such a recovery to stand, it would enter a field that has no sensible or just stopping point.

Courts continued to hold that the doctrine of *in loco parentis* does not apply to colleges and universities. The mother of a student at a military college in Georgia unsuccessfully claimed that school officials violated the Fourteenth Amendment by not protecting her daughter from being raped on campus. The Eleventh Circuit affirmed a dismissal in favor of the college on the ground that the mother did not establish that a voluntary custodial arrangement between it and the student led to a constitutional right to protection.[133] Despite representations by college officials that they would protect the student, the court agreed that they were entitled to qualified immunity from the due process claim.

In the first of two cases from New York, a student who was stabbed by a classmate challenged a grant in favor of his non-degree-granting business school where a trial court decreed that it was the functional equivalent of a college. An appellate court affirmed that the school was not a guarantor or insurer of the safety of its students, especially since it did not have notice of the likelihood of dangerous conduct by the attacker.[134]

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[131] Moore v. Phi Delta Theta, Co., 976 S.W.2d 738 [129 Educ. L. Rep. 875] (Tex. Ct. App. 1998).

[132] Conroy v. Marquette Univ., 582 N.W.2d 126 [127 Educ. L. Rep. 1068] (Wis. Ct. App. 1998).

[133] Santamorena v. Georgia Military College, 147 F.3d 1337 [127 Educ. L. Rep. 662] (11th Cir. 1998).

[134] Ellis v. Mildred Elley Sch., 667 N.Y.S.2d 86 [123 Educ. L. Rep. 838] (App. Div. 1997).

Where a student was injured during an overseas program arranged by a college from New York, an appellate court affirmed that its officials did not have an obligation to supervise her health care following an accident.[135] The court commented that *in loco parentis* does not apply to the college level.

In Ohio, a court rejected a student's argument that his university failed to protect him when he was hurt as he stepped into a puddle of boiling water created by a leaking steam pipe in the ground.[136] The court found that the student disregarded the steam rising from the ground when he stepped into the area to urinate near a stairwell.

Courts ruled on two incidents involving hazing or initiation rituals. In Louisiana, an appellate court affirmed that language in the manual of a national fraternity forbidding hazing did not impose a duty on it to prevent injuries to students who were hazed by members of a local chapter.[137] However, in a case involving the death of a student from alcohol poisoning, a trial court in New York refused to dismiss the action against a fraternity.[138] The court decided that insofar as the student's consumption of alcohol during a hazing or initiation ritual may be considered involuntary, it merited further consideration.

Conclusion

General trends in litigation involving students in higher education continued along established paths. One exception involves the recent paradigm shift concerning affirmative action. Reflecting the statutory changes in some states, majority students are increasingly asking judges to overturn admissions decisions by state college and university officials who use affirmative action as a means to diversify the student population.

Another area in which institutions may see the courts assign greater responsibility to institutional officials concerns drug and alcohol-related deaths of students. Despite a consistent rejection of the doctrine of *in loco parentis*, judicial action reflects society's fears for the safety of young people who attend residential institutions.

In other areas, litigation followed a business-as-usual pattern. Students with disabilities continued to challenge institutional policies and practices dealing with limits placed on the laws that are designed to offer them protection. Moreover, cases dealing with gender discrimination and sexual harassment further explored the definitions and limits of anti-discrimination laws.

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[135] McNeil v. Wagner College, 667 N.Y.S.2d 397 [123 Educ. L. Rep. 854] (App. Div. 1998).

[136] Butch v. University of Cincinnati, 695 N.E.2d 1245 [126 Educ. L. Rep. 1116] (Ohio Ct. Cl. 1997).

[137] Walker v. Phi Beta Sigma Fraternity (Rho Chapter), 706 So. 2d 525 [124 Educ. L. Rep. 478] (La. Ct. App. 1997).

[138] Oja v. Grand Chapter of Theta Chi Fraternity, 667 N.Y.S.2d 650 [123 Educ. L. Rep. 867] (Sup. Ct. 1997).

Courts remained deferential to academic decision-making. Students generally failed in challenges to the academic discretion of officials at colleges and universities, especially in establishing a cause of action for educational malpractice. Only when officials acted in bad faith, inconsistently with their own policies and procedures, or in violation of implied contracts did judges involve themselves in academic matters.

The fact that student debtors sought to discharge their loans should not be a surprise in a society in which bankruptcy cases are increasing at historical rates. Courts remained mindful of the need to balance the needs of individual debtors against those of creditors.

The significant property interests of proprietary institutions that seek eligibility to manage and distribute federal financial aid and the government's role as gatekeeper to federal student funds and safeguarding these monies will persist as a legal issue before the courts. If present trends follow the pattern of the last year, federal agencies will continue to prevail regarding the policies and regulations that they enforce.

10

FEDERAL AND STATE LEGISLATION

David L. Dagley

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Introduction

This chapter summarizes statutes passed in 1998 by the United States Congress and the legislative bodies of the fifty states that have an impact on educational institutions at the K-12 and collegiate levels.

Federal Legislation

The second session of the 105th Congress produced only a few pieces of legislation involving public education and almost all of them directly dealt with funding for higher education. A brief description of four federal bills passed into law in 1998 are described in this section.

Higher Education Amendments of 1998

The Higher Education Amendments of 1998 (HEA) renews grants, fellowships, and funding for program development in a broad array of initiatives for colleges and universities.[1] Inserted within this legislation are the Teacher Quality Enhancement Grants that provide funding for eligible partnerships composed of teacher training institutions, schools of arts and sciences, and local educational agencies (LEAs). These partnerships are charged with the duty of improving the quality of the current and future teaching force. In order to receive funding, partnerships must provide assurances of program improvement including such factors as teacher-candidate ability in content areas and the integration of technology into the teacher training curriculum.

Other provisions in the HEA speak to safety factors on college campuses. In fact, one section offers a study of institutional procedures in reporting sexual assaults. Another part amends the Family Educational Right to Privacy Act[2] so that universities are not prohibited from disclosing the outcomes of student disciplinary proceedings that arise from allegations of crimes of violence. Perhaps the most controversial aspect of the HEA places greater duties on student loan officers in institutions of higher education to help reduce the default rate on federally-subsidized student loans.

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[1] P. L. 105-244.

[2] 20 U.S.C. § 1232g.

Agricultural Research, Extension, and Education Reform Act

The Agricultural Research, Extension, and Education Reform Act[3] provides integrated research, education, and agricultural extension competitive grants to colleges and universities. This law includes funding for grants and fellowships for food and agriculture science education, for forests and rangelands research as well as for partnerships to create and produce high-value agricultural products.

Workforce Investment Act of 1998

The Workforce Investment Act of 1998[4] makes funds available for statewide and local workforce training including such recognized programs as Job Corps and adult and dislocated worker training. The Act anticipates a one-stop service provider in local communities that can provide a range of adult education training. Institutions of higher education and secondary-level vocational technical schools are eligible for funding under this Act. The statute addresses adult literacy needs and creates a National Council on Disability to guarantee equal opportunity in the workplace for individuals with disabilities.

National Sea Grant College Program Reauthorization Act of 1998

The National Sea Grant College Program Reauthorization Act of 1998[5] provides financial assistance to sea grant colleges and institutes that have an existing broad base of competence in fields related to ocean, coastal, and Great Lakes resources. The fiscal year 1999 appropriation under this legislation is $56,000,000 and it is anticipated that this amount will be increased by $1,000,000 annually until it reaches $60,000,000 for the fiscal year 2003.

State Legislation

This section of the chapter examines new educational laws that have been passed by the states. Acts have been organized into topic groupings that provide a sense of the different ways legislatures are attacking similar problems within the states.

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[3] P. L. 105-185.

[4] P. L. 105-220.

[5] P. L. 105-160.

Accountability

The states took many approaches to make schools more accountable to the public. The approaches included raising standards, testing for standards, changing the analysis of test data, providing incentive grants, and placing consequences on low-performing schools. This section chronicles the method adopted by each state offered in alphabetical order.

Arizona created a Technical Advisory Committee within its State Department of Education composed of members with technical expertise in pupil testing, statistics, and school finance. The advisory committee is charged with establishing a methodology for testing procedures, selecting a statewide representative sample of pupils, and assisting the State Board of Education in administering a statewide standardized norm-referenced achievement test.[6]

California took several steps to increase accountability. Under the Academic Improvement and Achievement Act, LEAs must submit proposals to the Superintendent of Public Instruction to fund activities designed to increase the percentage of pupils at qualifying high schools that meet admission requirements for the University of California and California State University systems.[7] California's second accountability-related law in 1998 requires local districts to adopt policies for promotion and retention at grades two through five. In addition, teachers are responsible for identifying students who are at risk of being held back a grade because of poor grades or assessments and must notify parents of the status of their children.[8] Particularly interesting in this bill is the requirement of a remediation program for at-risk students that must include, as needed, "instruction in phoneme awareness, systematic explicit phonics and decoding, word attack skills, spelling and vocabulary, (and) explicit instruction of reading comprehension, writing, and study skills."[9] Other legislation from California requires test publishers who contract with the State Board of Education to agree to disaggregate data in reports on the basis of gender and limited-English proficiency.[10] Further, the legislature expressed its intent that test publishers and the Superintendent of Public Instruction collaborate to develop a methodology to disaggregate scores based on a variable to serve as a proxy for "economically disadvantaged" status.[11]

Colorado passed the Educational Accreditation Act of 1998 as a way of addressing accountability.[12] This Act requires the public school accreditation process to focus on student achievement results based upon accreditation contracts. Of particular interest is legislation directing the accreditation process to emphasize standards-based education and testing with a recommended use of "recognized instructional strategies, including phonics, and emphasis on reading, writing, and mathematics."[13] The law creates corrective action cycles so that schools can move through three levels: notice, probation, and nonaccreditation.

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[6] 1998 Ariz. Sess. Laws, 4th S. S., Ch. 8, sec. 15.

[7] 1998 Cal. Stat 1045, sec 2.

[8] 1998 Cal. Stat. 742.

[9] *Id.*

[10] 1998 Cal. Stat. 845.

[11] *Id.*

[12] 1998 Colo. Sess. Laws 257, sec. 1

Illinois amended its Reading Improvement Block Grant Program to require applicants for the grants to include a proposed assessment method for measuring student reading skills and that recipients report assessment results to the State Board of Education.[14] School districts that do not show performance progress using an approved assessment method will be ineligible for funding in the third or subsequent grant years until progress is established. Illinois also directed the State Board of Education to pilot the use of short answer tests in reading and mathematics rather than multiple choice in its state goals and assessment program.[15] Under this modification, the State Board must discontinue the pilot if the use of short answer tests does not result in a statistically significant improvement in student achievement.

Indiana amended its law related to statewide educational testing.[16] The previous version listed children with disabilities whose Individualized Education Programs (IEPs) did not include regular instruction in mathematics, English, and language arts, among the students who were not covered by the testing program. The new version defers to the IEP process in deciding whether students with disabilities are included in the testing program.

Iowa required its State Board of Education to adopt rules regarding the incorporation of accountability for student achievement into the state's educational standards and accreditation program.[17] The statute also compels public schools and accredited nonpublic schools to develop, implement, and file a comprehensive school improvement plan showing parent, school, and community involvement in needs assessment, establishing standards, and student achievement levels. The comprehensive plan must set core academic indicators at selected grade levels in reading and mathematics and a report must be filed with the State Board of Education.

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[13] *Id.*

[14] 1998 Ill. Legis. Serv. 90-548 (West).

[15] 1998 Ill. Legis. Serv. 90-789.(West).

[16] 1998 Ind. Acts P.L. 12-1998.

[17] 1998 Iowa Acts 178.

Louisiana abandoned its existing incentive program and implemented a school and district accountability system.[18] The new system requires clear standards, expectations, and assessment in each school but focuses resources on the lowest-functioning twenty percent of schools in each district. Further, the change permits waivers of state-level policies and requires each school and district to develop or modify any existing improvement plans. Louisiana also added sixth grade to the years in which norm referenced testing is required.[19] Previously, testing was required in grades three, five, seven, and nine. Finally, Louisiana authorized the use of multiyear contracts with national testing services for up to twelve years.[20]

Minnesota added to its statewide testing and reporting system that was adopted in 1997.[21] The new requirements include the implementation of "profiles of learning" that outline all required standards in learning and curricular areas.[22] In addition, the legislation requires each local district to see that each of its schools meets state accountability expectations.[23] Under this last provision, site plans for improvement must be developed with parental participation if a school falls below accountability expectations for two out of three consecutive academic years.

Special legislation aimed at accountability in only one school district in the state was adopted by the Missouri legislature in the St. Louis Student's Bill of Rights.[24] This law sets up an assessment process to identify academically-deficient schools in St. Louis and provides for audit teams to determine factors contributing to the lack of student achievement. Each audit team must pass its findings to a ten-person management team that has the power to make recommendations to the Commissioner of Education. The management team has the authority to recommend recall election of board members, to suspend indefinitely the contracts of certified employees, and to limit the renewal of the superintendent's contract to one year.

North Carolina amended its accountability-related school statutes in two ways. One change focuses on the competency of principals in low-performing schools.[25] This section requires superintendents to recommend retention with an improvement plan, transfer, demotion, or dismissal for principals of low-performing schools. The State Board of Education, through an assistance team, is authorized to dismiss the principal when a local board fails to do so. The second accountability-related modification focuses on the competency of teachers and provides for local assistance teams to be assigned to low-performing schools.[26] The teams can provide technical assistance, train administrators in teacher evaluation, and recommend remediation, retesting, or dismissal of poor teachers.

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[18] 1998 La. Acts 478.

[19] 1998 La. Acts 41.

[20] 1998 La. Acts 20.

[21] 1997 Minn. Laws 138.

[22] 1998 Minn. Laws 398, art. 5, sec. 9, amended by 1998 Minn. Laws 398, art 4, sec. 51.

[23] 1998 Minn. Laws 398, art. 9, sec. 1.

[24] 1998 Mo. Legis. Serv. S.B. 781 (Vernon).

[25] 1998 N. C. Sess. Laws 59.

Pennsylvania added provisions for defining financially distressed schools and schools that have failed to provide educational programs that comply with appropriate regulations. The law also includes language that permits the Secretary of Education to appoint a new Chief Executive Officer (CEO) who, with the School Reform Commission, will take control of a school district.[27] The CEO will have the right to suspend employees without regard to statutory procedures, enter into contracts, reallocate resources, and negotiate new collective bargaining agreements. If a new bargaining agreement is not negotiated, the Secretary of Education will fix the school schedule and teachers may not strike or they will lose their certification. Elsewhere in the same statute school performance measures such as "dropout rate" and "number of students prepared to go on to higher education" are replaced with new measures, including "graduation rates," "attendance rates," "and employment rates."[28]

South Carolina adopted the Education Accountability Act of 1998 that established a performance-based accountability program for schools.[29] The Act requires the adoption of educational standards in core academic areas and mandates a statewide assessment program to measure student performance. Among the wide-ranging provisions of the law are authority for the State Superintendent to declare an emergency, provide technical assistance, replace a school principal, or assume management of a school.

South Dakota imposed a one-year delay on the requirement that each school district have and implement clearly defined and measureable course guidelines in language arts and mathematics (from 1998 to 1999). In addition, the new law delays the requirement that districts have guidelines in social studies and science (from 1999 to 2000).[30]

Tennessee granted the Commissioner of Education broad powers when authorized to take responsibility for any local school system or school that has been placed on probation under accountability statutes.[31] The legislation grants the Commissioner the same authority as state agencies to make expenditures for capital outlay, to issue debt for capital projects, to operate a school or district, to remove some or all of board members and the superintendent, and to appoint an agent to direct the operations of a district. Further, Tennessee amended its teacher certification law to require all students who wish to become teachers to pass both a test that measures professional knowledge and a standardized or criterion-referenced examination for each desired area of endorsement.[32]

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[26] 1998 N. C. Sess. Laws 5.

[27] 1998 Pa. Laws 46, sec. 2.

[28] 1998 Pa. Laws 46, sec. 22.

[29] 1998 S. C. Acts 400, sec. 2.

[30] 1998 S. D. Laws 83.

[31] 1998 Tenn. Pub. Acts 737.

Washington now requires students to choose an "educational pathway" such as work-based learning, school-to-work transition, technical preparation, vocational-technical education, running start, or preparation for technical school, community college, or university, once they have shown mastery of basic skills.[33] The statute calls for schools to inform parents and students about selected pathways and the right to transfer pathways so that students can still graduate on time.

West Virginia rewrote its two-year-old assessment and accountability program[34] to provide for multiyear assessments including the use of criterion-referenced tests, created by the state's educators, with the assistance of professional consultants.[35]

Attendance

Four states made minor changes related to school attendance, two created new exemptions to compulsory attendance, one added compulsory attendance in supplemental programs for students who are retained, and one took a training approach to increase attendance.

Arizona added attendance at charter schools to its other, previously existing attendance exemptions as a means of meeting the State's compulsory attendance requirements.[36] Moreover, the law added language establishing 200 days, as applicable, for the attendance requirement in year-round schools.[37]

New legislation in California permits local school districts to require attendance of students who have been retained at grade level in newly-required programs of direct, systematic, and intensive supplemental instruction in grades two through nine.[38]

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[32] 1998 Tenn. Pub. Acts 639.

[33] 1998 Wash. Legis. Serv. 225 (West).

[34] 1996 W. Va. Acts 114.

[35] 1998 W. Va. Acts 126.

[36] 1998 Ariz. Sess. Laws 141, sec. 1.

[37] 1998 Ariz. Sess. Laws 167, sec. 4.

[38] 1998 Cal. Stat. 743.

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Florida added private tutoring programs as a means of meeting compulsory attendance requirements.[39] Under this bill, private tutors are required to have Florida teaching certificates, maintain records, and meet requirements with respect to the length and number of school days.

Mississippi created the Office of Comprehensive School Attendance Enforcement within the State Department of Education.[40] The primary duty of the office is to approve comprehensive training for attendance officers in LEAs.

Buildings and Grounds

Ten states passed new laws addressing school facilities, buildings, and grounds.

Alaska enacted a law that requires funds for maintenance and periodic renovation of state buildings to be budgeted and accounted for separately from operating expenses.[41] Alaska also calls for certain preventative maintenance programs to be included in each school district's budget planning before it can become eligible for state construction funding.[42] In an attempt to save on design costs, Alaska's legislature asked the State Department of Education to design prototype schools and to suggest statutory changes that might provide incentives for schools to adopt prototypical designs in new construction.[43]

Arizona created a School Facilities Board to assess existing facilities and equipment deficiencies, to construct student population projections, and develop prototypical designs for future school buildings.[44] The statute sets minimum requirements for adequacy of school facilities and delegates to the facilities' boards authority to make rules regarding sites, cafeterias, libraries, media centers, auditoria, multipurpose rooms, technology, transportation, as well as facilities for science, art, and physical education. The legislation further authorizes negotiable, tax-exempt revenue bonds to finance new school facilities. Demonstrating health and environmental concerns, Arizona's legislature also made it a Class 2 Misdemeanor to knowingly apply or allow to be applied a liquid roofing system, 1/10 of one percent by weight or volume of any diisocyanate, on any facility owned or operated by a public school while a teacher or student is present in the building.[45]

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[39] 1998 Fla. Laws ch. 272.

[40] 1998 Miss. Laws 566.

[41] 1998 Alaska Sess. Laws 90 (H.B. 315).

[42] 1998 Alaska Sess. Laws 98 (H.B. 313).

[43] 1998 Alaska Sess. Laws Legislative Resolve 55 (SCR 19).

[44] 1998 Ariz. Sess. Laws, 5th S. S., Ch. 1, sec. 39.

[45] 1998 Ariz. Sess. Laws 104, sec. 1.

California added funding for school districts that have built facilities in the previous twenty-four months using all local resources, so that they may apply for funds for a multipurpose facility or gymnasium using fifty percent local funds and fifty percent state funds.[46]

Colorado established a school construction and renovation fund to provide matching grants for local districts to improve facilities.[47]

Florida created a Charter Schools Capital Outlay Fund to finance capital needs for charter schools.[48] The Fund is to be used to purchase and lease real property for charter schools, for lease of relocatable facilities for charter schools, for construction, renovation, repair, and maintenance of charter school facilities, and for purchasing vehicles to transport students to and from these schools. However, charter schools are ineligible for funding under this provision if they were created by conversion from a public school or if they operate free of charge or for a nominal fee in the host district's structure.

New legislation in Maine requires local administrative units to allocate a portion of their annual budgets to facilities maintenance, capital improvement, or capital reserve accounts.[49] The amount budgeted is referenced to the total value of real estate held by the administrative unit.

Minor legislation relating to buildings and grounds was adopted in Minnesota. One provision permits the commissioner of education to make grants for construction or rehabilitation of facilities for Head Start, Early Childhood and Family Education programs.[50] Another section of the bill authorizes grants for lead abatement in school facilities.[51]

New York created a comprehensive public school building safety program to provide uniform inspection, safety rating, and monitoring of buildings statewide.[52] This new law, which is appended to the state income tax code, requires each district to develop a building condition survey and a five-year capital facilities plan, and to establish a process for monitoring all buildings. Companion legislation provides $500 million in funding to assist districts to improve existing buildings.[53]

The Rhode Island legislature instructed the Department of Elementary and Secondary Education to develop regulations to ensure that new school construction provides for wiring to accommodate computer networking technology. [54]

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[46] 1998 Cal. Stat. 940, sec. 2.

[47] 1998 Colo. Sess. Laws 178, sec. 1-2.

[48] 1998 Fla. Laws ch. 206, sec. 2.

[49] 1998 Me. Laws 787.

[50] 1998 Minn. Laws 273, sec. 9.

[51] 1998 Minn. Laws 273, sec. 10.

[52] 1998 N. Y. Laws 56, Pt. B, sec. 1.

[53] 1998 N. Y. Laws 56, Pt. B, sec. 2.

[54] 1998 R. I. Pub. Laws 129, sec. 1.

West Virginia set air quality requirements in the construction of new schools.[55] The new law requires tests for radon. If radon is detected, contractors must use an active soil depressurization system to divert radon from the site.

Curriculum Requirements

The state legislatures continued to identify required curricular components for schools in 1998. Citizenship education, Arbor Day, physical education, cancer detection, and organ donorship are some of the areas mandated by legislation. Perhaps the dominant curriculum area addressed by the states last year was the improvement of reading instruction. This section describes curriculum requirements written into state law during the last year with provisions for reading listed first.

Arizona repealed a previously-existing section of state law[56] that required research- based systematic phonics instruction beginning with the 2000-2001 school year.[57] At the same time, the state withdrew the requirement that teachers undergo training in research-based systematic phonics instruction by exempting individuals who already had valid teaching certificates as of June 30, 1999.[58] To replace the mandate favoring phonics instruction, the legislature added provisions that require local school boards to conduct reviews of curricular and pedagogical techniques if more than twenty percent of fourth grade students are below the basic category on the reading performance standards score on the statewide norm-referenced achievement test.[59] Further, the statute requires intensive reading instruction, without specifying methodology, for each child at grade three who does not meet the reading comprehension standards prescribed by the State Board of Education.[60]

Kentucky addressed reading improvement by establishing an Early Reading Incentive Grant Fund steering committee and collaboration centers.[61] The grant fund and steering committee will provide grants to schools to support primary-grade teachers in the implementation of reliable, replicable, research-based reading models that use a variety of instructional strategies, including phonics, to address learning needs of students reading at low levels. Collaboration centers are to serve as clearinghouses of information and to collaborate with institutions of higher education to provide in-service training and direct assistance to school districts. The direct assistance to districts must include professional development and coaching for classroom teachers. A collaboration center will be established as a demonstration and training site at each state institution of higher education.

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[55] 1998 W. Va. Acts 127.

[56] ARIZ. REV. STAT. ANN. Sec. 15-718.

[57] 1998 Ariz. Sess. Laws 231, Sec. 6.

[58] 1998 Ariz. Sess. Laws 231, Sec. 5.

[59] 1998 Ariz. Sess.Laws 183, sec. 4.

[60] *Id.*

[61] 1998 Ky. Rev. Stat. & R. Serv. 580 (Baldwin).

Oklahoma amended legislation passed in the previous year[62] that had given authority to a reading assessment committee to use "phonics and other methodologies in wide practice."[63] The amended law lists the required components of a reading instruction plan to include phoneme awareness, phonics, spelling, reading fluency, and comprehension.

Citizenship education was another area of curriculum addressed by some legislative bodies. Alaska passed a resolution promoting "kids voting programs" within the schools and asked all citizens to join in to support and provide assistance to such programs.[64]

California funded, through the state librarian, grants for programs designed to educate the public about civil liberties vis-a-vis the detention and internment of Japanese-Americans during World War II. [65]

Illinois added "discipline" and "respect for others" to the previously existing list of topics (honesty, kindness, justice and moral courage) that every public school teacher must teach for the purpose of lessening crime and raising the standard of good citizenship.[66]

Other curricular areas required by legislation are as follows.

Alaska added infant care to the state list of suggested curricula for local school districts.[67]

Florida now requires a personal fitness program in each elementary and middle school.[68] Illinois added a requirement for school districts with grades 9 and 10 to include in its curriculum and teach to students of either grade one unit of instruction on organ and tissue donor and transplantation programs.[69] Regional superintendents of schools are required to maintain information and data that may be used to develop a unit and each school board may determine the amount of time that satisfies one unit of instruction. Students are not required to participate in the unit of instruction if their parents file a written objection to it on constitutional grounds.

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[62] 1997 Okla. Sess. Laws 349.

[63] 1998 Okla. Sess. Law Serv. 332 (West).

[64] 1998 Alaska Sess. Laws Legislative Resolve 67 (SCR 22).

[65] 1998 Cal. Stat. 570.

[66] 1998 Ill. Legis. Serv. 90-62 (West).

[67] 1998 Alaska Sess. Laws 4 (S.B. 117).

[68] 1998 Fla. Laws ch 421.

[69] 1998 Ill. Legis. Serv. 90-635 (West).

Mississippi passed new legislation imposing abstinence education as the state standard for any sex-related education taught in the public schools.[70] A local board may subvert this standard if it votes, by an affirmative vote of a majority, to require the teaching of sex education without instruction on abstinence.

New York added a requirement that health education, taught by a certified health teacher, include presentations on the detection of certain cancers.[71]

By concurrent resolution, the legislature in Oklahoma demonstrated its intent that every district board of education in the state shall provide high-quality physical education programs daily to every student, grades K-12, in the state.[72]

South Carolina added "instruction in phonics" to the list of required subjects offered in the curriculum program of each school district.[73]

South Dakota established Arbor Day as the last Friday in April while urging schools and other civic groups to seriously consider the contribution of trees to the beauty and economic welfare of the state.[74]

Employment

This section provides a discussion on employment-related legislation passed by state legislatures in 1998.

Alabama requires all school districts to post in a conspicuous place, in every building in the system, a notice of vacant personnel positions at least fourteen days before they are filled.[75] The legislation seems somewhat internally inconsistent because it also requires vacant positions to be posted only seven days before filling if they occur while schools are in session. Nonetheless, all supervisory and managerial positions must be posted for fourteen days before they are filled.

Arizona amended the requirements for certified personnel or governing board members with respect to reporting child abuse by prohibiting reprisals by the board or any district employee against a person who makes a report of child abuse based on reasonable grounds.[76] The act defines unlawful reprisals as "disciplinary action, transfer or reassignment, suspension, demotion or dismissal, unfavorable performance evaluation, or other significant change in duties or responsibilities inconsistent with the employee's salary or employment classification."[77]

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[70] 1998 Miss. Laws 510.

[71] 1998 N. Y. Laws 401.

[72] 1998 Okla. Sess. Law Serv. S. C. Res. No.70, Pamph. No. 5, p. A-22.

[73] 1998 S. C. Acts 400, sec. 11.

[74] 1998 S. D. Laws 6.

[75] 1998 Ala. Acts 147.

[76] 1998 Ariz. Sess. Laws 64, sec. 3.

[77] *Id.*

School district records relating to investigations of allegations of wrongdoing by certified personnel are now available to the State Department of Education at its request. These investigative records remain confidential and are not subject to public records laws. Even though the records are confidential, the state department now has the authority to pass them on to a district or other public school that currently employs the subject of the investigation.[78]

Employment law was changed in California so that staff in a year-round track, whose employing school districts request on or before April 30 for staff to give a notification of their intent to return by June 1, are presumed to have declined employment if they fail to give notice by June 1.[79]

A revision of the law now permits retirees in Colorado to return to teaching for up to 110 full days per year, or 770 hours for hourly employees, without reduction of pension or retirement benefits.[80]

Georgia enacted legislation that permits employees of the State Department of Education to participate in the Fullbright Educational Exchange program on equal terms with teachers in its public schools with no loss of pay and the right to return to their former jobs.[81] This legislation also protects Georgia from liability with respect to performance of the exchange teacher who temporarily replaces the public employee.

Indiana altered its teacher retirement law to permit individuals with ten or more years of service in public education to purchase credit gained in military service or while serving in private schools and have it credited to their retirement accounts.[82]

School employees in Iowa are now immune from civil or criminal liability for coming into physical contact with a student through the course of their employment responsibilities.[83] For immunity to apply, the contact between school employees and students must be reasonable and must occur during the following: encouraging, supporting, or disciplining a student, protecting the employee, student or other students, obtaining a weapon or other dangerous object from the student's control, protecting the employee, student, or school property, quelling disturbance or preventing an act threatening physical harm, removing disruptive students from class, any area of the school premises, or school sponsored activity off school premises; preventing a student from inflicting self-harm, providing self-defense, and doing any other legitimate educational activity.

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[78] 1998 Ariz. Sess. Laws . 64, sec. 1.

[79] 1998 Cal. Stat. 533.

[80] 1998 Colo. Sess. Laws 105, sec. 1.

[81] 1998 Georgia Laws 128.

[82] 1998 Ind. Acts P.L. 40-1998.

[83] 1998 Iowa Acts 199.

Kentucky passed three employment-related provisions during 1998. First, the Commonwealth's General Assembly altered the school employment law to provide seniority for classified employees with four or more years of continuing service within a job classification when a district must carry out a reduction-in-force.[84] Next, the legislature amended a prohibition against hiring someone who is a violent offender or who has been convicted of a felony sex crime by requiring superintendents to obtain national and state criminal background checks on all new certified employees.[85] Finally, the legislature added a law ordering district officials to remove all records and references to allegations of criminal offenses by employees from their personnel files if the investigations did not lead to criminal charges, if the person were found not guilty, or if charges were formally dismissed.[86] Despite this language, a district is not precluded from separately investigating, acting on, and creating and maintaining records on the same or similar fact situation upon which the allegations of criminal offense were based.

Michigan's retirement law was amended to permit retirees to be paid a reduced allowance for life with the provision that upon death, payment of seventy-five percent of the reduced retirement allowance will be continued throughout the lifetime of the designated retirement allowance beneficiary.[87]

The Mississippi legislature was especially active in the area of employment law. First, the legislature passed a bill designed to address shortages in critical teaching areas.[88] The bill establishes a Mississippi Teacher Center which is charged with initiating high school and college teacher recruitment programs, beginning teacher mentoring programs, sponsoring teacher renewal institutes, providing research for the development of professional teacher standards, and assisting LEAs in identifying specific teacher needs. Increased scholarships are mandated and payment of moving expenses of newly-hired teachers in critical shortage areas is now permitted. In a second piece of legislation, Mississippi now permits local school superintendents to enter into conditional employment contracts with uncertified teachers when their graduation and certification is pending.[89] A third law allows district employees to donate unused sick or personal leave days to another who is experiencing personal catastrophic injury or illness to self or immediate family members.[90] Finally, a fourth change permits all accrued leave, major medical leave, and personal leave earned by school employees to be transferrable between or among any and all state agencies, junior colleges, and colleges.[91]

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[84] 1998 Ky. Rev. Stat. & R. Serv. 590 (Baldwin).

[85] 1998 Ky. Rev. Stat. & R. Serv. 362 (Baldwin).

[86] 1998 Ky. Rev. Stat. & R. Serv. 469 (Baldwin).

[87] 1998 Mich. Pub. Acts 213.

[88] 1998 Miss. Laws 544.

[89] 1998 Miss. Laws 408.

[90] 1998 Miss. Laws 580.

Missouri changed its certification law to require applicants for teacher and administrative certification to have successfully attained qualifying scores on an exit assessment and undergo a criminal background check.[92] Applicants who fail the exit examination may receive a two-year nonrenewable certificate. The act also amends legislation defining cause for revocation of certificates notably by adding sex offenses and offenses against children.

In order to allow experienced teachers the opportunity for professional growth and development and to identify highly-qualified, experienced educators who can serve as resources in their areas of expertise in curriculum development, mentoring, supervising, and evaluating other teachers, New Hampshire established the educational credential of Master Teacher.[93] The statute specifies requirements for achieving the higher credential, but provides no authority for holders of the certificate to recommend any personnel action.

New York amended sections of the law preserving employment rights for teachers to include situations where boards of cooperative educational services take over educational programs for local school districts.[94] The amendment gives the same employment rights to affected teaching assistants and teacher aides.

North Carolina altered its retirement law to permit reciprocity in credit for service time between the teachers' retirement system and the local government employees' retirement system.[95]

Ohio now permits the transfer of credit from other retirement funds such as those for police, firemen, highway patrol, and the United States armed forces, to the state teacher retirement fund.[96] Further, Ohio added new language that permits members of the teacher retirement system to purchase service credit for time on pregnancy leave prior to 1982.[97]

South Dakota added school psychologists as a category of persons with privileged communications under state law.[98] The privilege does not extend to situations of suspected child abuse or where a student or other person's physical or mental health is in jeopardy. Previously, school counselors were granted the same privilege.

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[91] 1998 Miss. Laws 366.

[92] 1998 Mo. Legis. Serv. 42 (Vernon).

[93] 1998 N. H. Laws 314:4.

[94] 1998 N. Y. Laws 511.

[95] 1998 N. C. Sess. Laws 71.

[96] 1998 Ohio Laws H. 648.

[97] 1998 Ohio Laws H. 673.

[98] 1998 S. D. Laws 122.

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Tennessee expanded the procedural requirements for dismissal of teachers.[99] Besides establishing time lines and setting requirements related to notice, the act requires the use of an impartial hearing officer prior to appeal to a board, requires exhaustion of administrative procedures, and provides de novo review in the chancery court.

Finance

This section lists legislative provisions related to school finance other than appropriations that were passed.

California now prohibits the State Board of Education from adopting standards and criteria requiring large districts—those with an average daily attendance of more than 125,000—to have budget reserves for uncertainties in excess of one percent of their total expenditures, transfers out, and other uses in a fiscal year.[100]

Florida's legislature directed the Office of Program Policy Analysis and Governmental Accountability and the Office of the Auditor General to develop a system for reviewing the financial management practices of school districts.[101]

Idaho established a Public School Permanent Endowment Fund in the state treasury, derived from proceeds from the sale of lands granted to the state by the federal government; lands, money, and other property acquired by gift or grant; estates that escheat to the state; unclaimed shares and dividends of any corporation incorporated in the state; and proceeds of royalties from extraction of minerals on public school land.[102] Only interest from the Permanent Endowment Fund may be used for the benefit of its beneficiaries. In addition, Idaho created a Public School Earnings Reserve Fund derived from earnings from the endowment fund, proceeds from the sale of timber from school land, and proceeds from leases of school land.[103] Three funds were created for the benefit of universities: the University Permanent Endowment Fund,[104] the University Earnings Reserve Fund,[105] and the University Income Fund.[106]

Minnesota earmarked additional funds designated as "integration aid," to assist local districts in delivering programs established under a desegregation plan mandated by the State Board of Education or a court order.[107]

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[99] 1998 Tenn. Pub. Acts 805.

[100] 1998 Cal. Stat. 784.

[101] 1998 Fla. Laws ch. 225.

[102] 1998 Idaho Sess. Laws 256, sec. 7.

[103] 1998 Idaho Sess. Laws 256, sec. 8.

[104] 1998 Idaho Sess. Laws 256, sec 11.

[105] 1998 Idaho Sess. Laws 256, sec. 12.

[106] 1998 Idaho Sess. Laws 256, sec. 14.

[107] 1998 Minn. Laws 389, art. 2, secs. 4, 5.

Mississippi amended its municipal code to permit the governing authority of any municipality to donate personal property or funds to public school districts or districts located in the municipality for the promotion of educational programs.[108]

By an initiative of the people, enabling legislation for a proposed amendment to the constitution of Montana offers that no new tax or tax increase may be enacted unless it is first approved by a majority of electors voting on it in the geographic area subject to the tax.[109]

New Jersey amended its state purchasing laws to permit school districts to purchase by sale and lease-back textbooks and non-consummable instructional materials if the price and amount of principal for lease-back do not exceed fair market value and the interest charged is consistent with prevailing market rates or less.[110]

Recognizing that schools in urban areas require additional resources, Rhode Island altered its school-funding provisions to make additional allocations to those communities.[111]

The South Dakota legislature submitted a constitutional amendment to the voters to permit school corporations to levy additional taxes necessary to secure a thorough and efficient system of common schools, to empower the legislature to classify properties into separate classes for the purpose of school taxation, and to require uniformity in taxation with each class.[112] South Dakota also made changes in the control and transfer of state school lands. One section repealed 640-acre restrictions on leasing lands,[113] while another changed procedures for leasing state school lands.[114] A third provision makes it easier to transfer land in small tracts to civil, religious, or public organizations, by raising the maximum acreage that may be transferred from 10 to 160 acres.[115] Finally, the legislature amended economic development revenue bond legislation to permit bonds to be used to finance construction for primary, secondary, and postsecondary schools operated by nonprofit entities.[116]

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[108] 1998 Miss. Laws 452, sec. 2.

[109] 1998 Mont. Laws 75.

[110] 1998 N. J. Laws 55.

[111] 1998 R. I. Pub. Laws 475, sec. 1.

[112] 1998 S. D. Laws 2 (H. J. R. 1006).

[113] 1998 S. D. Laws 7.

[114] 1998 S. D. Laws 8.

[115] 1998 S. D. Laws 10.

[116] 1998 S. D. Laws 46.

Governance

This section describes changes and additions made in the states related to school governance.

Alabama specified that new city school board members, chosen by city councils in April, were to take office at the next regular meeting in June.[117] Prior to this clarification, it was assumed that new members would take office at the next meeting after their appointment.

Arizona extended the authority for local school boards to form joint vocational technical education districts after December 31, 1998.[118]

Dealing with what it may have perceived as lack of cooperation on the part of some districts, the Colorado legislature placed a duty on local boards of education affected by the appointment of a school organization planning committee to cooperate with the committee by providing requested information.[119]

Louisiana amended statutes related to the general powers of city and parish school boards by striking language that permitted a majority of board members to elect teachers without endorsement of the superintendent.[120] Now, city and parish boards may select teachers and all certified personnel only from recommendations made by the superintendent. Additionally, consultation with principals is required for hiring teachers, and consultation with teachers is required for hiring principals.

Massachusetts added a statute permitting boards of trustees, boards of higher education, and boards of any other public or private educational institution to form cooperative purchasing consortia.[121]

New York altered the method of election and composition of community boards within the New York City Community School District.[122]

Oklahoma amended its grant of powers to local school boards to include a statement empowering them to perform all functions necessary to the administration of a district and those powers necessarily implied but not specifically delegated.[123]

In reaction to its 1995 school finance decision,[124] the Wyoming Legislature moved to consolidate responsibility for data collection for the state school finance system in the State Department of Education and created therein a Division of Data Management and Reporting.[125]

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[117] 1998 Ala. Acts 147.

[118] 1998 Ariz. Sess. Laws 52, sec. 4.

[119] 1998 Colo. Sess. Laws 151, sec. 1.

[120] 1998 La. Acts 42.

[121] 1998 Mass. Act 194, sec. 59.

[122] 1998 N. Y. Laws 149.

[123] 1998 Okla. Sess. Law Serv. 217, sec. 2.

[124] Campbell County Sch. Dist. v. State, 907 P.2d 1238 [105 Educ. L. Rep. 771] (Wyo. 1995)

[125] 1998 Wyo. Sess. Laws 6, sec. 1202.

Tennessee amended school board voting provisions to require a majority of the whole board, not just a majority of a quorum, to be present before it can transact business.[126]

Parental and Student Rights

A number of states addressed the rights of parents and students, particularly with respect to free speech and religious exercise. Some states articulated parental rights to inspect curricular materials or seek alternative presentations of material for their children. Most notable perhaps was legislation in Washington that could arguably be characterized as disclaiming the authority of school districts to control the curriculum under *Hazelwood School District v. Kuhlmeier*[127] in situations where a student might respond to curricular requirements with expressions of religious exercise.

Alabama added the requirement that a period of quiet reflection of sixty seconds duration will occur at the opening of each school day.[128] The law provides that nothing within the law shall prevent student-initiated voluntary school prayers, which are nonsectarian and nonproselytizing in nature, at school or school-related activities.

California legislation requires that any time an outside organization or guest speaker is scheduled to deliver AIDS prevention instruction or any time an assembly is held to deliver AIDS prevention instruction, notification shall be sent to parents or legal guardians ten to fifteen days before the instruction.[129] Students cannot be subject to disciplinary action, academic penalty or other sanction, if parents or guardians refuse to permit students to attend. The statute also provides for alternative instruction if a child does not attend the presentation. In addition, California passed the Educational Empowerment Act of 1998, which directs teachers to compile, store, and make available all primary and supplemental instructional materials for inspection by parents or guardians, and requires governing boards to make reasonable accommodations for parental inspection of materials, rules and regulations, on written request of the parent.[130] A prospectus of the public school curriculum, including titles, descriptions, and instructional aims of every course offered by the public school, is required. The legislation further dictates that a child cannot be compelled to affirm or disavow any particular personally or privately held world view, religious doctrine, or political opinion, nor may the school require information regarding assessment, analysis, evaluation or monitoring of the quality of a student's home life, conduct any parental screening or testing, conduct any nonacademic home-based counseling, provide parent training, nor follow any prescribed family education service plan.

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[126] 1998 Tenn. Pub. Acts 717.

[127] 484 U.S. 260 [43 Educ. L. Rep. 515] (1988).

[128] 1998 Ala. Acts 381.

[129] 1998 Cal. Stat. 403.

[130] 1998 Cal. Stat. 1031, sec. 2.

Illinois amended its state goals and assessment statute to forbid academically-based tests from including assessment or evaluation of attitudes, values, or beliefs, or test of personality, self-esteem, or self-concept.[131]

Kentucky added a new law designed to clarify misunderstandings about religion, free speech, and public education and to stress that neutrality and accommodation, not hostility, to religion is required.[132] The act articulates the right of students to pray voluntarily, express one's religious viewpoint, speak with others, distribute literature in the school subject to reasonable manner, place, and time restrictions, and be absent for religious observances.

Mississippi added a measure to a provision declaring abstinence education the state standard for sex-related education, thus, giving parents control over the exposure of their children to sex-related curricula.[133] As a result, before a presentation on human sexuality is given in a classroom, assembly, or other official setting, school officials must notify parents or guardians at least one week in advance in writing of the presentation, inform them of their right to review the materials and curriculum, and notify them of the process for reviewing the materials and curriculum. School officials must excuse students from exposure to the presentation upon request.

New York countered zero-tolerance drug policies within local school districts by adopting a requirement for boards to allow pupils who have been diagnosed with a severe asthma condition to use a prescribed inhaler during the school day with written permission from a doctor and parental consent.[134]

Washington adopted legislation recognizing the rights of free speech and freedom of religion while specifying that students may choose to exercise those rights in response to the challenge of their academic pursuits.[135] The law indicates that it is not the role of education to solicit student responses that force them to reveal, analyze, or critique their religious beliefs. The statute includes a statement of student rights with respect to free speech and religious expression such as to freely incorporate the student's religious beliefs and opinions where relevant and appropriate into class work, homework, and tests.

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[131] 1998 Ill. Legis. Serv. 90-789 (West).

[132] 1998 Ky. Rev. Stat. & R. Serv. 294 (Baldwin).

[133] 1998 Miss. Laws 510.

[134] 1998 N. Y. Laws 353.

[135] 1998 Wash. Legis. Serv. 131 (West).

Program Development

The states continued to be laboratories for experimentation in instructional programming. This section describes legislation within the states, through grants, program requirements, and program creation.

Alabama added a requirement that all districts employ registered school nurses, starting with one in each system in the 1999-2000 school year.[136] The number of nurses is to be increased each year so that there would be one for each 7,000 pupils in the 2000-2001 school year, finally ending with one nurse for 2,000 pupils in the 2010-2011 school year.

Among its funding provisions, Arizona added a state block grant for early childhood education.[137]

California adopted a law to promote the adoption of the International Baccalaureate Diploma Program within local school districts.[138] In addition, California created a State Summer School for Mathematics and Science for intensive training for students and to increase interest in further study in these curricular areas.[139] The specialized summer school may operate for a duration of four to six weeks. The law creates a full-time position of Director within the State Department of Education and authorizes the employment of two assistants. California also removed an existing ten percent cap on the number of participants in continuation or opportunity schools, as applied to pregnant students or parents who are the primary caregivers of their children.[140] Finally, California established a three-year accreditation pilot project with the objectives of expanding the number of accredited teacher preparation programs in the state, increasing the number of certified teacher candidates, determining whether current teacher preparation standards are sufficient to ensure quality and effectiveness, and proposing modifications to existing standards.[141]

The Florida Maximum Class Size Study Act directs the State Department of Education to study the efficacy of reductions in class size accomplished by appropriations for this purpose.[142] Beginning in the 1998-1999 school year, at least one school in each district will reduce its teacher-to-student ratio to one teacher to twenty students (1:20) in grades K-3. In any district where there is a critically low-performing elementary school, the required ratio drops to 1:15. In the event the appropriation is insufficient for full implementation, priority will be given for the youngest grades and the lowest-performing schools. In addition, Florida's legislature created a college-ready diploma.[143] Under this program, if students take classes for a standard high school diploma, additional classes adopted by the Board of Regents, and a post-secondary placement test, they are entitled to admission to a public post-secondary education program that terminates with a diploma or a certificate with a less than four-year degree without further placement testing. Florida also offered performance-based funding for workplace development programs and an information system to study workplace development programs.[144] Workplace development programs include those that prepare people to enter high-wage occupations as well as prepare people who are eligible for public assistance, who are economically disadvantaged, have disabilities, low English proficiency, or are dislocated workers.

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[136] 1998 Ala. Acts 672.

[137] 1998 Ariz. Sess. Laws, 4th S. S., 8, sec. 2.

[138] 1998 Cal. Stat. 794.

[139] 1998 Cal. Stat. 805.

[140] 1998 Cal. Stat. 461.

[141] 1998 Cal. Stat. 544.

[142] 1998 Fla. Laws ch. 211.

Georgia provided grants to support driver's education programs and required such courses to garner one-half Carnegie unit of elective credit.[145]

Idaho used its funding formula to offer incentives for the creation of professional-technical schools that are located at a separate site from a regular high school facility.[146] Professional-technical schools must offer dual credit in a majority of its class offerings so that students may obtain both high school credit and credit from an accredited institution of higher education. All programs in professional-technical schools must involve at least one supervised field experience.

Indiana now has a provision to establish educational programming for high ability students in the domains of general intellectual ability, general creative ability, specific academic skills, skills in the technical and practical arts, skills in the visual and performing arts, and interpersonal skills.[147] The law does not add resources for high ability students. Rather, the statute requires the State Department of Education to use existing resources to assist local school corporations in developing programs, enable educational opportunities, and provide statewide integrated services that include information and material resources centers, professional development plans and programs, research and development services, and technical assistance. The legislation further provides that a local governmental body may develop a plan and provide a local program for high ability students, but does not require it.

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[143] 1998 Fla. Laws ch. 246, sec. 6; 1998 Fla. Laws ch. 421, sec. 1.

[144] 1998 Fla. Laws ch. 58; 1998 Fla. Laws ch. 307.

[145] 1998 Ga. Laws 1520.

[146] 1998 Idaho Sess. Laws 261, sec. 2.

[147] 1998 Ind. Acts P. L. 34-1998, sec. 2.

Kentucky set the stage for ungraded primary programs by adding a new law defining primary school programs.[148] Primary school programs will be provided for students upon entry into school and until they are ready for fourth grade. Critical attributes of the primary programs include developmentally appropriate educational practices, classrooms capable of accommodating students of multiple ages and abilities, continuous progress, authentic assessment, qualitative reporting methods, professional teamwork, and parental involvement. Each school council will determine the organization of its ungraded primary program.

Minnesota amended its assurance of mastery program which permits local districts to offer additional services for pupils who have not demonstrated progress toward mastery of required graduation standards.[149] Additional services may be provided by a student's regular classroom teacher. However, the instruction must differ in the rate or sequence from the initial presentation, in the teaching methods or techniques, or in the instructional materials used.

Missouri declared English as the common language of the state and required the Department of Elementary and Secondary Education, subject to appropriations from the general fund, to provide grants to public entities to provide instruction to individuals in the community with language backgrounds other than English.[150]

New Hampshire established a special school district within the Department of Corrections for incarcerated offenders under the age of twenty-one.[151] The special district will be exempt from State Board of Education rules except for standards related to students with disabilities. All educational programs will operate under an interagency contract between the Department of Education and the Department of Corrections. The statute specifies that the district shall not be required to provide special education programs or services to children with disabilities aged eighteen to twenty-one who were not identified in a prior educational placement or did not have an IEP prior to being incarcerated.

New Jersey instituted a School Transportation Study Commission to study its transportation system, to study alternative systems including county or regionally-based systems, and to investigate courtesy busing, safety busing, special education busing, and nonpublic student busing.[152]

The North Carolina legislature directed the Department of Public Instruction to form a task force to identify the barriers that prevent local boards of education from providing year round schools and identify ways LEAs and the State Board of Education can minimize or remove those barriers.[153]

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[148] 1998 Ky. Rev. Stat. & R. Serv. 434 (Baldwin).

[149] 1997 Minn. Laws 4, art. 2, sec. 12, amended by 1998 Minn. Laws 398, art. 2, sec. 25.

[150] 1998 Mo. Legis. Serv. 35 (Vernon).

[151] 1998 N. H. Laws 270:6.

[152] 1998 N. J. Laws 110.

Oklahoma added legislation permitting local school boards to develop and issue a Certificate of Distinction to be awarded to graduating seniors who have at least a 3.25 grade point average on a 4.0 scale, and who successfully pass all criterion-referenced testing for the twelfth grade.[154]

Rhode Island's legislative body directed the State Department of Elementary and Secondary Education to develop a model community service learning program and guidelines for implementing it while encouraging the adoption of community service learning programs within school districts.[155] The law also authorizes the use of credit earned in such programs to be used for high school graduation. A second piece of legislation requires all elementary schools with forty percent or more students eligible for free and reduced lunch to offer breakfast programs.[156] A related section establishes after-school programs for middle, junior, and high schools in urban areas.[157]

South Carolina provided funding for class size reduction to one teacher for each fifteen students, in grades 1-3, with priority going to schools rated as unsatisfactory on state accountability ratings.[158]

Virginia encouraged gifted education programming by requiring each school board to submit a report on programs for gifted children and to submit a written annual report describing a local plan for education of the gifted.[159] The plan must identify a local advisory committee and stipulate multiple criteria for identification of gifted students.

West Virginia created a summer school reading program called W. Va. READS (Reading Excellence Accelerates Deserving Students).[160] The program provides grant awards for schools with reading test scores below the state standards.

School Choice

During the 1998 legislative sessions, two states made minor changes to existing charter schools legislation and four states adopted new charter schools legislation. Two other states experimented with other means to deregulate public schools and provide more educational choices for parents and students.

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[153] 1998 N. C. Sess. Laws 133.

[154] 1998 Okla. Sess. Law Serv. 251.

[155] 1998 R. I. Pub. Laws 47, sec. 1.

[156] 1998 R. I. Pub. Laws 31, art 31, sec. 5.

[157] 1998 R. I. Pub. Laws 31, art 31, sec. 3.

[158] 1998 S. C. Acts 400, sec. 12.

[159] 1998 Va. Acts 879.

[160] 1998 W. Va. Acts 126.

California amended its charter schools provisions to increase the number of charter schools authorized to operate from 250 in 1998-1999 to 350 in 1999-2000.[161] Attached to this provision is a requirement compelling admission for all who wish to attend a charter school, except in space-limited charter schools, where a public random lottery will be used to decide who is admitted.

Two years after beginning charter schools, Florida added charter technical career centers as a category of charter schools.[162]

New charter school legislation was adopted in four states. In Georgia, the Charter Schools Act of 1998 permits local public schools to subcontract, on a performance basis, with charter schools, on the application of state and local rules, regulations, policies, and procedures.[163] Private individuals, private organizations, or state or local private entities may be contracting charter schools. However, home-study programs, schools operated by sects or religions, private for-profit schools, private educational institutions not established, operated, or governed by the state and existing private schools may not be contracting charter schools.

Idaho added charter school legislation but limited the number of charter schools to twelve per year, totalling sixty in five years.[164] Charter schools will be organized and managed under the Idaho Nonprofit Corporation Act and will be considered public agents, with authority to sue, be sued, purchase, receive, hold, and convey property, and to borrow funds. The approving authority will have no liability for the acts or omissions of a charter school, except by contract. The petition to operate as a charter school must include statements of the following: educational goals, measure of student standards; methods for achievement, testing provisions; standardized tests, governance structure, qualification of employees; admission procedures; annual audit procedures; discipline rules; employment, retirement, transfer and collective bargaining rights; and special education services.

Utah created charter schools as the second part of its Schools for the Twenty-First Century Initiative.[165] The legislation provides waivers from State Board of Education rules, in exchange for the submission of accountability reports. The state board may terminate a charter for failure to meet performance standards; failure to meet generally accepted fiscal management standards; violation of law; or other good cause. Under the law, for purposes of tort liability, employees of a charter school are public employees and its board is a public employer equivalent to a public school board.

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[161] 1998 Cal. Stat. 673.

[162] 1998 Fla. Laws ch. 302, sec. 1.

[163] 1998 Ga. Laws 1080.

[164] 1998 Idaho Sess. Laws 92.

[165] 1998 Utah Laws 231.

New York passed charter schools legislation with the Charter Schools Act of 1998.[166] This act is designed to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate independently of existing schools and districts. In addition, the legislation is intended to improve student learning; increase learning opportunity with focus on those at risk; encourage the use of different and innovative techniques; provide parents and students with expanded choices; and, provide schools with a method to change from rules to performance-based accountability systems. Applications for charter schools may be filed in conjunction with a college, university, museum, educational institution, not-for-profit tax exempt corporation, or for-profit business or corporation authorized to do business in New York. If the applying entity is a for-profit corporation, the charter will specify the extent of the corporate entity's participation in the management and operation of the school. The enabling legislation provides for a total of one hundred charter schools and that a separate bargaining unit is created when a school enrolls 250 or more students.

States also experimented with choice plans other than charter schools. Florida created a pilot program to deregulate public schools in order to provide "the same flexibility and accountability afforded charter schools."[167] In order to be released from state regulation, a principal and school advisory council must submit a proposal outlining the curriculum, instructional methods and how the school will differ from a regulated school as well as a statement of goals for improvement. Deregulated schools would be exempt from school statutes and regulations except the following: civil rights; student health, safety, and welfare statutes; public records and sunshine laws; teacher certification requirements and fingerprinting requirements; number of days in a school year requirements, building and facilities codes, and fire protection codes.

Beginning in the fiscal year 2001, Maryland will fund "state-aided educational institutions."[168] In order to qualify for status as a state-funded school, an entity must submit to the Department of Education the names of members of the independent governing board, proof of nonprofit status, an independent annual audit or internally generated financial statements pending an annual audit, a showing that less than fifty percent of the budget is derived from state grants, a showing of all sources of income and expenditures, a plan for the use of funds originating from state-aided institutional grants, and evidence of the provision of direct service to Maryland school groups or individuals with disabilities.

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[166] 1998 N. Y. Laws 4.

[167] 1998 Fla. Laws ch. 281, sec. 23.

[168] 1998 Md. Laws 657.

School Safety

A variety of approaches were adopted to address school safety issues. Some states widened zero-tolerance zones around schools and enhanced sentencing guidelines for criminal acts occurring within the zones. Other states adopted broad-based approaches to school safety including multi-agency involvement to address safety concerns. Criminal background checks were required in some states for new employees and at least one state required the sharing of information about the criminal activities of students. Two states addressed safety concerns related to natural disasters. This section lists the approaches adopted by the states in addressing school safety issues.

California passed the School Community Policing Partnership Act to assist schools in carrying out their state constitutional mandate to provide safe schools.[169] This act makes funds available for competitive grants for local school districts and county offices to ensure safe, secure, and peaceful school campuses by a collaborative and integrated approach between grant recipients and law enforcement agencies.

Colorado amended and extended its statutes related to employment ineligibility of teachers with criminal records so that any person who has been convicted of a sexual offense against a child is ineligible for the office of school director.[170] Colorado also modified existing provisions calling for mandatory expulsion for students who bring weapons to school. Subsequently, a student with a weapon who notifies a staff member as soon as possible and delivers the weapon to someone in authority is no longer subject to mandatory expulsion.[171]

Georgia school administrators with knowledge of a student's felony conviction are required to inform all teachers to whom the student is assigned of the availability of information in the student's file.[172] Although the statute places a duty on administrators to inform teachers, it also places a duty on teachers privy to the information to keep it confidential.

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[169] 1998 Cal. Stat. 317.

[170] 1998 Colo. Sess. Laws 151, sec. 1.

[171] 1998 Colo. Sess. Laws 157, sec. 1

[172] 1998 Ga. Laws 1061.

The Illinois General Assembly accomplished a major restructuring of juvenile justice statutes to authorize and encourage each of the counties in the state to establish a comprehensive juvenile plan based upon the input of representatives of every affected public or private entity, organization, or group.[173] School systems, the judiciary, law enforcement agencies, and the community are encouraged to collaborate and implement the plan to adopt an immediate intervention process when juveniles commit delinquent acts. Further, this legislation amends school student records provisions by requiring temporary records to include information on serious disciplinary actions, defined as "infractions involving drugs, weapons or bodily harm to others."[174]

Kentucky created a Center for School Safety to serve a variety of functions for schools.[175] The functions of the Center include establishing a clearinghouse for information and materials concerning school violence prevention, researching and evaluating school safety programs, administering the school safety grant program, promoting interagency efforts, preparing and disseminating information on best practices, and advising the State Board of Education on administrative policy and regulations. In the same act, the legislature directed each local board to assess school safety and discipline, to review reports, behavior codes, staff and parent training needs, and to provide students with anger reduction, conflict resolution, and peer mediation programs.

Maine established a "safe children zone," defined as the area within 1,000 feet of the real property comprising a private or public elementary or secondary school or a licensed day care center. [176] If the state pleads and proves that a defendant committed a sex offense within the zone, it can be used as an aggravating sentencing factor in determining the appropriate criminal sentence.

Two tornado safety drills are now required each school year in Michigan.[177] The tornado safety drills are to be conducted for the purpose of preventing fires and related hazards and injuries caused by severe weather.

New Jersey made minor changes in its 1987 legislation calling for criminal background checks,[178] to require the Commissioner of Education, rather than an individual applicant, to provide information on background checks to nonpublic schools.[179] Additional changes include a revised listing of the applicable crime and an alteration of the procedural requirements for appeals.

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[173] 1998 Ill. Legis. Serv. P.A. 90-590, Art. 2001, sec. 2001-10.

[174] *Id.*

[175] 1998 Ky. Acts 493.

[176] 1998 Me. Laws 768.

[177] 1998 Mich. Pub. Acts 45.

[178] 1987 N. J. Laws 164.

[179] 1998 N. J. Laws 31.

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New York adopted two provisions relating to safety factors in schools. It amended its penal code to make it a rebuttable presumption that a person has knowledge that he is within the grounds of a child day care or educational facility, when criminal sale of a controlled substance is made there, and notice is conspicuously posted on the premises.[180] Moreover, New Jersey modified its criminal procedure law, penal law, and family court act to provide juvenile offender status for persons aged fourteen and fifteen who have criminal possession on school grounds of certain weapons including machine guns and firearms.[181]

Ohio added a statute requiring every school board to adopt zero-tolerance policies for violent, disruptive, or inappropriate behavior, and to establish strategies to address those behaviors.[182] Additionally, each "Big 8" district in the state is required to establish at least one alternative school to meet the needs of students with severe disciplinary problems.

Pennsylvania made two changes within its criminal code to address school safety issues. First, the commonwealth made it a third-degree misdemeanor for any person with intent to commit a crime or disrupt or interfere with the driver to board a school bus without prior authorization of the driver or school official or for any person to refuse to disembark after being ordered to do so by the driver.[183] Second, the commonwealth made it a second degree felony for a person eighteen years old or older to solicit anyone less than eighteen to engage in a violation of the Controlled Substances Act or deliver or conspire to deliver a controlled substance to such a person, intending, knowing, or having reason to know that the person under eighteen intends to violate the act in a drug-free zone.[184] The legislature defines a drug-free zone as the area within 1,000 feet of real property that is a public, private, or parochial school, or college or university, including school buses, or within 500 feet of a school bus stop. Pennsylvania also addressed school safety by adding a provision in its education code to permit the board of directors of any school entity to impose limits on dress and to require pupils to wear standard dress or uniforms, applied throughout the entity or within one or more buildings in the entity.[185]

Rhode Island now requires a criminal background check for any person seeking employment with public school departments if the job involves the exercise of supervisory or disciplinary power over children or routine contact with children without the presence of other employees.[186]

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[180] 1998 N. Y. Laws 289.

[181] 1998 N. Y. Laws 435.

[182] 1998 Ohio Laws H. 650.

[183] 1998 Pa. Laws 65.

[184] 1998 Pa. Laws 40.

[185] 1998 Pa. Laws 46, sec. 6.

[186] 1998 R. I. Pub. Laws 315, sec. 1.

South Dakota extended the range of a drug-free zone from 500 to 1,000 feet for public or private schools and from 100 to 500 feet from public or private youth centers, public swimming pools, or video arcades.[187] Bringing a controlled substance into the drug-free zone remains a Class 4 felony, punishable with a minimum of five years imprisonment.

Tennessee adopted four new provisions related to school safety. One act makes it a Class A misdemeanor for a person without lawful business to enter a school or refuse to leave at the request of the principal or other authorized person.[188] This law also provides a civil cause of action for an intentional assault on educational personnel on school grounds or in school-owned vehicles with treble actual damages. A second statute requires the State Board of Education to develop a standardized form for data collection related to zero tolerance violations in local school systems.[189] A third act permits a school to deny enrollment to a student who is under suspension or expulsion in another district, either in Tennessee or in another state.[190] Finally, Tennessee required implementation of earthquake preparation plans, including earthquake preparedness drills twice yearly, in each school building within 100 miles of the New Madrid fault line.[191]

Students with Disabilities

This section describes legislation passed by the states related to students with disabilities.

Colorado amended its special education law to prohibit schools from appointing a person to act as a surrogate parent for the purpose of making placement or consent decisions when parents are unknown, unavailable, or fails to respond.[192]

Indiana added a provision[193] specifying that a suspension, expulsion, or other disciplinary action against a child with a disability is subject to procedures of the Individuals with Disabilities Education Act (IDEA)[194] as well as rules adopted by the State Board of Education.

Maine enacted legislation authorizing school administrators to suspend an exceptional student up to a maximum of ten days, individually or cumulatively, for infractions of school rules.[195] When a student is suspended, a school may not be required to provide a tutor, transportation, or any other aspect of the child's special education program.

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[187] 1998 S. D. Laws 140.

[188] 1998 Tenn. Pub. Acts 875.

[189] 1998 Tenn. Pub. Acts 871.

[190] 1998 Tenn. Pub. Acts 830.

[191] 1998 Tenn. Pub. Acts 993.

[192] 1998 Colo Sess. Laws. 256, sec. 3.

[193] 1998 Ind. Acts P.L. 12-1998, sec. 2.

[194] 20 U.S.C. 1415.

Minnesota adopted the Interagency Services for Children with Disabilities Act.[196] This act requires the development and implementation of a coordinated, multidisciplinary, interagency intervention service system for children with disabilities between the ages of three and twenty-two. It also establishes a state interagency committee to grant funds for intervention demonstration projects. In addition, Minnesota included provisions for a statewide data management system which maximizes medical assistance reimbursement in special education programs for health and health realted services.[197] The legislation authorizes districts to contract with billing agents, and is aimed at seeking maximum reimbursement for health-related services offered in special education programs.

Missouri added a new section relating to interim alternative educational settings for students with disabilities who are disciplined for violations involving weapons or drugs, or because the student is a danger to himself or others.[198]

Mississippi amended its special education law to permit any aggrieved party within thirty days of the decision of the special hearing officer to a due process hearing under the IDEA to bring civil action in any state court of competent jurisdiction or in any district court of the United States, without regard to the amount in controversy.[199]

New York clarified the requirements for continuous supervision of physical therapy assistants in a school setting by licensed physical therapists. The law also stipulated situations in which actual on-site supervision is not required every time a physical therapy assistant works with a patient.[200]

Ohio added a requirement that when regional and local entities providing services to students with disabilities decide to cease or change services from one school year to the next, they must provide notice by March 1.[201] The bill also encourages schools to maximize their financial return by participating in the reimbursement program for health-related services.

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[195] 1998 Me. Laws 594.

[196] 1998 Minn. Laws 398, art. 3., secs. 2, 3.

[197] 1998 Minn. Laws 398, art. 2, sec. 2.

[198] 1998 Mo. Legis. Serv. 41 (Vernon).

[199] 1998 Miss. Laws 353, sec. 2.

[200] 1998 N. Y. Laws 20.

[201] 1998 Ohio Laws H. 770.

West Virginia passed the Blind Person's Literacy Rights and Education Act.[202] The act places a presumption favoring the use of Braille in a blind student's IEP unless the child's study team proves otherwise. Further, West Virginia passed legislation to pay for services for victims of traumatic brain and spinal cord injury including case management, rehabilitation therapy, attendant care, home accessibility modifications, equipment, and family support services.[203]

In creating a special school district within the Department of Corrections for incarcerated offenders under the age of twenty-one, New Hampshire moved to block the identification and provision of services to offenders age eighteen to twenty-one, who were not identified as a students with disabilities or did not have IEPs prior to their incarceration.[204]

Technology

States addressed the integration of technology into instructional programs in a multitude of ways. Besides pilot projects and demonstration grants for on-site instruction, provision was made to provide distance education on the world wide web. One state expressed concern for the availability of pornographic materials on the Internet. The variety of approaches among the states is consistent with the flexibility and creativity that appropriate integration of technology into instructional programming will require.

Arizona's Legislature adopted a law creating a technology-assisted instruction program. This project funds four demonstration sites to pilot programs designed to meet the needs of pupils in the information age. At least one of the four schools selected by the State Board of Education to pilot the project must be a K-12 school. The State Board and the joint legislative committee must report to the Governor, Speaker of the House, and the President of the Senate.[205]

The California Technical Assistance Project was established in the State Department of Education to administer a regional network of technical assistance for implementation of educational technology.[206] The enabling legislation directs that funds be used for staff development, learning resources, hardware, telecommunications infrastructure, technical assistance to school districts for operating and maintaining infrastructure for improved pupil recordkeeping and tracking related to pupil instruction. Separate legislation supplies $20 per pupil in grades four through eight for grants for educational technology staff development.[207] A third new law in California requested the State Board of Education, in consultation with the Superintendent of Public Instruction and the State Department of Education, to report to the legislature by March 1, 1999, on how current instructional materials adoption processes can be improved or supplemented to enable the timely adoption of electronic resources.[208] The law requests a definition of electronic instructional materials and a discussion of potential unintended consequences. Finally, the legislature adopted the California Public School Library Act of 1998 that requires LEAs to develop a district-wide library plans for participation in funding for library resources, including books, periodicals, microforms, audiovisual materials, computer software, CD-ROMs, and to purchase equipment for accessing library resources and on-line resources.[209]

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[202] 1998 W. Va. Acts 128.

[203] 1998 W. Va. Acts 249.

[204] 1998 N. H. Laws 270:6.

[205] 1998 Ariz. Sess. Laws 224, sec. 2.

[206] 1998 Cal. Stat. 801.

A Colorado statute permits local school districts or cooperatives of districts to create online programs to provide instruction via the internet. Students receiving instruction in this manner will be released from compulsory attendance requirements, will be counted by their resident school district for funding purposes, and will be permitted to participate in extracurricular activities on an equal basis.[210]

Illinois amended its funding provisions for vocational education and technical preparation program to provide for distance education as a means of delivering those programs.[211]

Kentucky addressed concerns about the availability of sexually-explicit materials over the internet by requiring the State Board of Education to promulgate administrative regulations to prevent their transmission.[212] The legislation requires each local school district to adopt a policy on this issue and to use the latest available filtering technology. The State Department of Education must make available upon request, without cost, state-of-the-art software products. Presumably, this last provision relates only to filtering software.

Maine passed legislation authorizing telecommunications service agreements of up to ten years in length between school administrative units, applied technology regions, and private service providers.[213] The agreements may provide for the purchase or lease/purchase for technology equipment.

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[207] 1998 Cal. Stat. 844.

[208] 1998 Cal. Stat. 616.

[209] 1998 Cal. Stat. 332.

[210] 1998 Colo. Sess. Laws, 190, sec. 2.

[211] 1998 Ill. Legis. Serv. 90-649, sec. 5 (West).

[212] 1998 Ky. Rev. Stat. & R. Serv. 330 (Baldwin).

[213] 1998 Me. Laws 664.

Massachusetts amended its purchasing statutes to permit procurement officers to award, without competitive bids, contracts of less than $10,000, for library books, school texts, and educational programs, courses, curricula, and any media, including educational software, newspapers, serials, periodicals, audiovisual materials, or software maintenance.[214]

New York changed its municipal law to permit governing boards of political subdivisions to dispose of computers, software, and technology equipment.[215] Donations may be made under this law to public schools, public libraries, and other public and private institutions for secular educational use.

Pennsylvania provided grants for technology equipment and services while giving the Department of Education authority and duty to purchase computer hardware, software, the connectivity and related technology and to loan them to all students in the commonwealth grades K-12 who are enrolled in nonpublic and private schools.[216]

Training Programs

In 1998, legislatures passed laws to address training needs for teachers, teacher aides, administrators, and board members. Adoption of master teacher certificates through the National Board of Professional Teaching Standards continued to gather support in more states. Some states focused specific attention on in-service training for teachers in reading and mathematics.

California allocated funds for the State Department of Education to administer grants program for inservice training of teachers in mathematics in grades four through twelve.[217]

Colorado placed additional requirements on university and college programs that prepare school administrators by requiring them to ensure that program graduates are ready to accomplish standards-based performance assessments of personnel under their supervision.[218] The performance assessments must address variety in teaching and learning styles, student performance and assessment, data collection and documentation, and school district standards and mandates.

Florida passed legislation authorizing LEAs to adopt programs with five levels of career development for paraprofessional employees.[219] Of particular importance within this new law are limits placed on the role of paraprofessionials. For example, establishing instructional objectives, making decisions about the propriety of materials for teaching objectives, and making judgments about the attainment of objectives are outside the prescribed role of paraprofessionals.

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[214] 1998 Mass. Acts 172.

[215] 1998 N. Y. Laws 618.

[216] 1998 Pa. Laws 46, sec. 11.

[217] 1998 Cal. Stat. 315.

[218] 1998, Colo. Sess. Laws 100, sec. 1.

[219] 1998 Fla. Laws ch. 219.

Six states adopted incentive programs to encourage teachers to seek certification through the National Board of Professional Teaching Standards (NBPTS). Florida's program creates categorical funding for compensation bonuses, application fee subsidies, and subsidies for portfolio development.[220] Florida also appropriated funds for districts to contract with NBPTS-certified teachers for up to twelve work days to provide mentoring and related services to other teachers.

Mississippi now adds $6,000 to the state payments to local school districts for salary supplements for any licensed teacher meeting the requirements and acquiring the Master Teacher certificate from NBPTS.[221]

New York established the Albert Shanker NBPTS grant program in the Department of Education that provides awards to participants and three days' leave per year for each participating teacher.[222]

North Carolina enacted teacher salary schedules that provide enhanced pay of approximately $300-$500 more per month for teachers with the NBPTS certification.[223]

Oklahoma provided for bonus pay for teachers who have already received NBPTS certification, and appropriated funds to assist more teachers to achieve the certification.[224]

The Tennessee version of this legislation requires the Commissioner of Education to reimburse the fees for up to twenty-five teachers.[225]

Indiana created the position of Ambassador for Education to serve as an educational liaison to Indiana Schools and whose primary duty is to provide professional development seminars and workshops throughout the state.[226] In this program, the Superintendent of Public Instruction annually selects a teacher to serve a one-year term during which the teacher may choose to work with an Indiana institution of higher education or the State Department of Education.

Louisiana added a training requirement for school board members.[227] Each board member must now receive a minimum of six hours of training in the state law, laws governing the powers, duties, and responsibilities of school boards, and in educational trends, research, and policy. The training is to be provided by institutions of higher education, the State Department of Education, school district central offices, or the Louisiana School Boards Association.

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[220] 1998 Fla. Laws ch. 309.
[221] 1998 Miss. Laws 533.
[222] 1998 N. Y. Laws 58, Pt. C, sec. 9(4).
[223] 1998 N. C. Sess. Laws 153.
[224] 1998 Okla. Sess. Law Serv. 350 (West).
[225] 1998 Tenn. Pub. Acts 921.
[226] 1998 Ind. Acts P.L. 26-1998.
[227] 1998 La. Acts 66.

Teachers with three years' experience in Mississippi may apply for a program that will allow them to take a one-year sabbatical to pursue administrative certification.[228]

Oklahoma appropriated funds and directed its Commission on Teacher Preparation to develop, offer, and administer professional development institutes to train elementary school teachers in reading education.[229] The same law directs that, when appropriations become available, the commission develop and offer professional development institutes in mathematics for teachers in grades five through nine in the use of technology in the classroom, in teacher mentoring, and in hands-on inquiry-based science for elementary teachers.

South Carolina passed legislation requiring each school district to provide a formalized induction program for principals serving as head building administrator for the first time.[230] The induction program must focus on elements of instructional leadership skills, the implementation of effective schools research, and the analysis of test scores for curriculum improvement. In a related statute, the legislature assured administrators that they retain their contract rights previously held as teachers.[231]

Washington provided funding for training in reading instruction for teachers in the primary grades.[232] The legislation indicates that it supports a comprehensive approach to teaching reading and requires the professional development include primary emphasis on the following beginning reading skills: phonemic awareness instruction; explicit and systematic decoding instruction and diagnosis of the student's ability to decode; explicit spelling instruction; explicit instruction in reading comprehension strategies; and research findings on skills needed by beginning and proficient readers along with how beginning reading skills are acquired.

In order to promote high quality instructional delivery and management practices for a thorough and efficient system of schools, West Virginia created a strategic staff development fund.[233] The legislation also requires coordination of professional development plans on a local and regional basis as well as a state master plan. Monies from the fund are to be used for staff development and to contract with an independent evaluator to evaluate the effectiveness of the program.

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[228] 1998 Miss. Laws 544.

[229] 1998 Okla. Sess. Law Serv. 5.

[230] 1998 S. C. Acts 400, sec. 6.

[231] 1998 S. C. Acts 400, sec. 7.

[232] 1998 Wash. Legis. Serv. 271 (West).

[233] 1998 W. Va. Acts 126.

Higher Education

Legislation related to higher education, in comparison to legislation for K-12 schools, again took a minor role. This section provides a summary of higher education-related legislation within the states.

A new law in Florida now requires each university and community college to establish a process to remove elected student government association officers who have been convicted of a violation of a criminal law or have been found civilly liable for an act of moral turpitude.[234] Students who face removal from student government under this statute are to be suspended and replaced temporarily during the appeal process. Florida also established a Leadership Board for Applied Research and Public Services to be staffed by the Institute of Science and Public Affairs at Florida State University.[235] The purpose of the leadership board is to focus, coordinate, and maximize university resources on current issues and events affecting Florida residents and elected officials and it is directed to emphasize being responsive to and providing accurate, timely, useful, and relevant information to decision makers in state and local government. Finally, out-of-state colleges seeking to have a minimal presence in Florida, in order to maintain a business office, providing an occasional seminar that carries college credit, arranging an occasional clinical clerkship for medical students, or providing other operations not involving a regular, continuous credit-bearing educational program in the state, must now get permission from the State Board of Independent Colleges and Universities.[236]

Georgia's concern for borrowers who default on student loans prompted its legislature to require the Georgia Higher Education Loan Program to maintain a statewide, certified list of borrowers in default who have not made satisfactory arrangements to repay.[237] The certified list of those in default must be communicated to licensing agencies which issue or renew any license, certificate, permit, or registration to authorize a person to engage in a profession, business, or occupation in the state. Licensing agencies must notify borrowers in default of their intent to suspend licenses, withhold issuance of licenses, or withhold renewal of licenses prior to doing so.

A few states addressed prepaid college tuition programs during 1998. Missouri established its MOSTARS higher education savings program.[238]

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[234] 1998 Fla. Laws ch. 421, sec. 55.

[235] 1998 Fla. Laws ch. 65, sec. 22.

[236] 1998 Fla. Laws ch. 169, sec. 5.

[237] 1998 Ga. Laws 1094, sec. 6.

[238] 1998 Mo. Legis. Serv. 108.

Oklahoma created a savings plan to be used for higher education tuition.[239]

West Virginia amended its Prepaid Tuition Trust Act[240] to provide confidentiality to protect the identity of beneficiaries, purchasers, or donors in the program.[241]

New York amended its income tax code to provide deductions for the cost of college textbooks.[242]

Pennsylvania gave presidents of its institutions of higher education the power to award contracts on a competitive bid basis for amounts of $10,000 or greater and to award contracts without bids for amounts of less than $10,000.[243]

The Rhode Island legislature declared that each student, staff member, teacher, and administrator has a right to attend and/or work at an institution of higher education which is safe and secure, conducive to learning, and free of threat of actual or implied physical harm by disruptive students.[244] The legislature also imposed a requirement on all admissions offices in institutions of higher education to include forms for voter registration in information packets provided to state residents.[245]

South Carolina established Legislative Incentives for Future Excellence (LIFE) Scholarships that provide up to $2,000 per year for eligible resident students to attend any college except those whose sole purpose is for religious or theological training.[246]

Postsecondary institutions in South Dakota are now required to have articulation agreements that permit transferability of up to sixty-four credit hours in general studies at the baccalaureate degree level.[247]

Tennessee adopted legislation to require a full set of fingerprints and a criminal background check for all owners and directors applying for initial authorization to operate a postsecondary institution within the state.[248]

Persons who are newly admitted to a Washington public or private institution of higher education and who are sex offenders or convicted kidnappers must notify the sheriff of their intent to enroll within ten days of doing so.[249] Those already attending must notify the sheriff immediately. The sheriff must then inform the institution's department of public safety and provide personal information about the students and their criminal history. Another new bill permits districts in Washington to enter into cooperative agreements with community colleges in Oregon and Idaho in order to allow eleventh and twelfth grade students to earn high school and college credit concurrently.[250]

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[239] 1998 Okla. Sess. Law Serv. 366 (West).
[240] 1997 W. Va. Acts 80.
[241] 1998 W. Va. Acts 129.
[242] 1998 N.Y. Laws 94.
[243] 1998 Pa. Laws 46, sec. 16.
[244] 1998 R. I. Pub. Laws 30, sec. 1; 1998 R. I. Pub. Laws 51, sec. 1.
[245] 1998 R. I. Pub. Laws 338, sec. 1.
[246] 1998 S. C. Acts 418, sec. 1.
[247] 1998 S. D. Laws 98.
[248] 1998 Tenn. Pub. Acts 685.
[249] 1998 Wash. Legis. Serv. 139 (West).

Miscellaneous

Two states passed laws that do not seem to fall easily into any of the categories described above. This section briefly describes those laws.

New Hampshire legislation prohibits any person not complying with the Military Selective Service Act[251] from enrolling in a state-supported institution of higher education, from being eligible for a loan, grant or scholarship supported by state revenue and from being eligible for employment by or service to the state or its political subidivisions, including school boards.[252]

Ohio adopted a "no-pass, no-play" law that sets minimum grade point average standards for participation in extracurricular activities.[253]

Conclusion

The 1998 legislative year was a comparatively inactive year in the United States Congress, but an extremely active one within the states. State legislatures seemed to be true laboratories in addressing issues, problems, and dilemmas in educational policy.

States continued to demand more accountability from schools, to provide more choices in the delivery of education, and to afford more opportunities to waive state regulations as a means of seeking improvements. Safety issues continued to be a primary area of concern as fourteen states adopted more than twenty pieces of legislation in this area. After years of setting higher standards of performance for educators, many states are now providing funding for additional educator training. Further, states added many new curricular requirements to courses of study and experimented with the adoption of diverse programs. Several states showed concern for values and the protection of speech and religious liberties of students.

In consideration of the breadth of measures adopted by the states related to education, one can see trends in approaching problems in sometimes uniform ways. At the same time, great diversity is evident. Certainly, the views, biases, concerns, and expectations of the American public regarding its schools are reflected within this body of legislation.

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[250] 1998 Wash. Legis. Serv. 63 (West).

[251] 50 U.S.C. 451 et. seq.

[252] 1998 N.H. Laws 273:1.

[253] 1998 Ohio Laws H. 215.

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EDUCATION RELATED

David J. Sperry & Scott Ellis Ferrin

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Introduction

This chapter summarizes the 1998 United States Supreme Court decisions that have no immediate education link as neither the plaintiffs nor the defendants are students, teachers, professors, administrators, school districts or universities. However, these cases are included here because of their possible implications for educators and their attorneys.

Collective Bargaining

A collective bargaining agreement between Delta Air Lines and the Air Line Pilots Association (union) contained an agency shop clause that required nonunion pilots to pay a portion of union expenditures related to collective bargaining activities. More than 150 nonunion Delta pilots challenged the union over the manner in which it calculated their agency fees, charging that the union overstated the percentage of its costs genuinely attributable to bargaining activities. Pursuant to their policy, union officials referred the objection to the American Arbitration Association even though the pilots never formally agreed to arbitration. The pilots who appeared before the arbitrator sought to enjoin arbitration. Previously, a majority of pilots filed suit against the union even before the agency shop agreement. The federal trial court for the District of Columbia granted the union's motion for summary judgment in concluding that the pilots had to exhaust arbitral remedies before seeking judicial relief. On further review, the Court of Appeals for the District of Columbia reversed declaring, "[w]e simply see no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process."[1]

The United States Supreme Court agreed to hear an appeal on the limited question of "whether an objector must exhaust a union-provided arbitration process before bringing an agency-fee challenge in federal court."[2] In accepting the appeal, the Court pointed out that four circuit courts reached differing results on the question. Of the four appellate cases that the Court referred to, it is worth noting that two of them were school cases.[3] In upholding the decision of the Court of Appeals, the Supreme Court ruled that "[u]nless they agree to the procedure, agency-fee objectors may not be required to exhaust an arbitration remedy before bringing their claims in federal court."[4]

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[1] Miller v. Air Line Pilots, 108 F.3d 1415, 1421 (D.C. Cir.1997).

[2] Air Line Pilots Ass'n v. Miller, 118 S. Ct. 1761, 1765 (1998).

[3] *See*, Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807 (9th Cir. 1997) (exhaustion not required) and Bromley v. Michigan Educ. Ass'n-N.E.A., 82 F.3d 686 [109 Educ. L. Rep. 557] (6th Cir. 1996). The other two cases were Lancaster v. Air Line Pilots Assn. Int'l, 76 F.3d 1509, 1522 (10th Cir. 1996) (exhaustion of arbitral remedy required) and Miller, *id.*

Miller is meaningful to educators insofar as it provides clarification on an important agency shop question. Further, *Miller* can be seen as part of a string of significant Supreme Court cases dealing with collective bargaining in education beginning with *Abood v. Detroit Board of Education*[5] wherein it was held that agency shops do not violate the constitutional rights of nonunion employees unless fees are used to support objectionable political and ideological views. Nine years after *Abood*, the Court heard *Chicago Teachers Union, Local 1 v. Hudson*.[6] In *Hudson* the Court explained that in order to safeguard the First Amendment rights of nonunion teachers, collective bargaining organizations must provide dissenters with a fair opportunity to contest objectionable charges for political and ideological expenditures and the process must include "a reasonably prompt decision by an impartial decision maker."[7] *Hudson* also expressly approved properly conducted arbitration as an appropriate procedure for resolving such disputes.[8]

Disabilities

A patient who was diagnosed as HIV positive in 1986 visited a dentist in 1994 for an examination and disclosed on the registration forms that she was HIV positive. The dentist, after completing an examination and discovering a cavity, informed the patient that he followed a policy of not filling cavities of HIV positive patients in his office. He then offered to perform the dental work in a hospital with no added fee for his services although the patient would be responsible for the cost of using the hospital facilities. The patient refused this arrangement, and filed suit under the Americans with Disabilities Act of 1990 (ADA) in the federal district court for Maine.[9] The court granted the patient's motion for summary judgment.

On appeal, the First Circuit affirmed that being diagnosed HIV positive, even though asymptomatic, qualified as a disability under the ADA. Moreover, the court was convinced that treating the patient in the dentist's office would not have posed a direct threat to the health or safety of others. The court acknowledged that if there had been a direct threat to health or safety of others, a dentist or other public accommodation or service provider may be qualifiedly freed from some of the ADA's prohibitions on discrimination against persons with disabilities. In finding that the patient did not pose a direct threat to the health or safety of others, the First Circuit relied on the 1993 Dentistry Guidelines of the Centers for Disease Control and Prevention (CDC) and the 1991 American Dental Association Policy on HIV.

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[4] Miller, *id.* at 1769.

[5] 431 U.S. 209 (1977).

[6] 475 U.S. 292 [30 Educ. L. Rep. 649] (1986).

[7] *Id.* at 307.

[8] *Id.* at footnote 21, p. 308.

[9] Abbott v. Bragdon, 912 F. Supp. 580 (D.Me. 1995).

The Supreme Court, in *Bragdon v. Abbott*,[10] used a different rationale to arrive at the same outcome. The Court reviewed the various statutory constructions and definitions governing whether a disability exists and decreed that being HIV positive is sufficient in and of itself to qualify as a disability under relevant statutory guidelines, thereby tolling the protections of the ADA. The Court asserted that HIV infection is a disability under the ADA, even when the infection has not yet progressed to the so-called symptomatic phase since it represents a physical impairment which substantially limits the major life activity of reproduction. In addition, the Court was of the opinion that: "the existence of a significant risk is determined from the standpoint of the health care professional who refuses treatment or accommodation and the risk assessment is based on the medical or other objective, scientific evidence available to him and his profession, not simply on his good-faith belief that a significant risk existed."[11] The Court specifically remarked that the dentist was not freed from the ADA's provisions by believing that a significant risk existed even though he was following guidelines promulgated by professional associations such as the American Dental Association. The Court observed that such guidelines were inadequate to assess whether a significant risk existed since they were mere professional guidelines meant to guide general practices. In addition, the Court suggested that the First Circuit may have relied inappropriately on these guidelines in reaching its decision. The Court asserted that such guidelines as those promulgated by the CDC merely recommend certain universal precautions to combat the risk of HIV transmission in the dental environment but are insufficient to actually assess the level of risk in individual cases. In indicating that guidelines such as the 1991 American Dental Association Policy on HIV are the work of a professional organization, not a public health authority, the court stated that:

> We note, however, that the Association is a professional organization, which, although a respected source of information on the dental profession, is not a public health authority. It is not clear the extent to which the Policy was based on the

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[10] 118 S. Ct. 2196 (1998).

[11] *Id.* at 2200.

> Association's assessment of dentists' ethical and professional duties in addition to its scientific assessment of the risk to which the ADA refers. Efforts to clarify dentists' ethical obligations and to encourage dentists to treat patients with HIV infection with compassion may be commendable, but the question under the statute is one of statistical likelihood, not professional responsibility. Without more information on the manner in which the American Dental Association formulated this Policy, we are unable to determine the Policy's value in evaluating whether petitioner's assessment of the risks was reasonable as a matter of law.[12]

Bragdon has important implications for schools and other educational agencies and entities; first, because the Court clarified and harmonized earlier case law and statutory pronouncements by ascertaining that being HIV positive in and of itself rises to the level of having a disability that tolls the protections against discrimination under the ADA. As such, students who are HIV positive do not need to be suffering from any debilitating symptoms before schools are required to provide the ADA's protections. Second, the Court made clear that general guidelines, even from professional or medical groups such as the American Dental Association or the Dentistry Guidelines from the CDC may be insufficient in individual cases to assess whether a direct threat to the health or safety of others exists. Under this distinction, educational leaders may not be freed from having to provide the full quantum of protections under the ADA to students who are HIV positive simply because they follow district or state policy in good faith in considering whether a direct threat to health or safety exists. The existence of a significant risk should be evaluated in light of a risk assessment based on medical or other objective, scientific evidence. Even though the Court did not make an explicit pronouncement, *Bragdon* seems to maintain that good practice for schools dealing with evaluating threats to health or safety from students or others who are HIV positive would be to make risk assessments on individualized bases, citing specific scientific evidence relevant to the case before determining that they can be exempted from the ADA's nondiscrimination provisions. Moreover, if schools rely on guidelines from professional or governmental authorities, their scientific bases should be understood clearly and explained to all, including reviewing courts so that its applicability can be determined on an objective scientific basis.

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[12] *Id.*

Drugs/Firearms

In *Muscarello v. United States,*[13] the Supreme Court consolidated and reviewed two circuit court cases on the meaning of "carries a firearm" as found in 18 USC § 924(c)(1). This federal statute imposes a five-year mandatory prison term[14] on persons who use or carry a firearm during and in relation to any crime of violence or drug trafficking. The five-year imprisonment is in addition to any punishment imposed for the primary or instigating offense.

In the first case,[15] a defendant in Louisiana who was convicted of trafficking marijuana in his truck had a handgun locked in the glove compartment. In the second case,[16] defendants in Massachusetts placed several guns in a bag in the trunk of the car they used to travel to the place of the drug sale. Both the Fifth and First Circuits interpreted the phrase "carries a firearm" as meaning more than simply carrying weapons on one's person or bearing them in such a manner that they are ready for use as weapons. The courts interpreted the law as including the carrying of a weapon in a vehicle used in drug trafficking. In a five to four decision, the Supreme Court affirmed.

Obviously, *Muscarello* pertains more to police officers and prosecutors of drug and firearms violations than to school officials. However, in light of the amount of drug and firearm problems affecting the nation, including schools, *Muscarello* is a case of general interest and lends support to recent Supreme Court holdings backing the fight against drug trafficking in schools.[17]

Employee Discipline

Five employees from four different federal agencies — Veterans Affairs, Treasury, Defense Logistics, and Interior — challenged adverse actions by their respective employees. Each employee made false statements to agency investigators with respect to the misconduct with which

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[13] 118 S. Ct. 1911 (1998).

[14] The prison term increases to ten years if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon. If the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, the imprisonment period increases to thirty years. And in the case of second or subsequent convictions under this law, the individual shall be sentenced to imprisonment for twenty years; and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.

[15] United States v. Muscarello, 106 F.3d 636 (5th Cir. 1997).

[16] United States v. Cleveland, 106 F.3d 1056 (1st Cir. 1997).

[17] *See, e.g.,* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 [101 Educ. L. Rep. 37] (1995).

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they were charged. In each instance, the agency used the false statement as an additional basis for the adverse actions. The final outcome in all cases was based in part on the added charge. All five of the employees, in separate cases, appealed to the Merit Systems Protection Board (MSPB), which upheld each of the penalties on the underlying charges but reversed or overturned the claims dealing with the false statements. In the language of the Supreme Court, the MSPB was of the view that "an employee's false statements could not be used for purposes of impeaching the employee's credibility, nor could they be considered in setting the appropriate punishment for the employee's underlying misconduct."[18] When the five suits went before the Court of Appeals for the Federal Circuit, it consolidated them and affirmed the judgment of the MSPB in positing that:

> The burden is on an agency to prove charges against an employee. An agency has means to prove charges other than through admissions or denials of an employee under investigation. While it might be easier for an agency to prove a charge by using the leverage of an added charge of falsification to compel admissions, due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge. Accordingly, while an employee has no right to lie or make a false statement to an agency, an employee's mere denial of charges and their underlying facts may not be used by an agency as a basis for a falsification or similar charge.[19]

The Supreme Court agreed to hear an appeal to determine "whether either the Due Process Clause or the Civil Service Reform Act (CSRA), 5 USC § 1101 et seq., preclude a federal agency from sanctioning an employee for making false statements to the agency regarding alleged employment-related misconduct on the part of the employee."[20]

After reviewing the four procedural rights[21] in the Civil Service Reform Act accorded employees against whom adverse action was proposed, in *Lachance v. Erickson*, the Court declared that "[t]here is not [a] hint of any right [in the Act] to 'put the government to its proof' by falsely denying the charged conduct."[22] As such, the Court posited that "if such a right exists at all it must come from the Fifth Amendment of the United States Constitution."[23] Upon examining the Fifth Amendment, the Court could not find that such a right existed there either.[24]

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[18] Lachance v. Erickson, 118 S. Ct. 753, 755 (1998).

[19] King v. Erickson, 89 F.3d 1575, 1584 (Fed.Cir. 1996).

[20] Lachance v. Erickson, 118 S.Ct. 753, 754-755 (1998).

[21] According to the Act, an agency must give an employee: (1) "at least 30 days advance written notice;" (2) "a reasonable time, but not less than 7 days, to answer orally and in writing and furnish . . . . evidence in support of the answer;" (3) the opportunity "be represented by an attorney or other representative;" and (4) "a written decision and the specific reasons therefor." 5 USC § 7513(b).

The application of *Lachance* to public education seems to be relatively straightforward. In other words, the meaningful opportunity to be heard in an adverse action investigation does not include a right to make false statements with respect to the alleged misconduct. The sole exception might be if a state statute expressly permits one to do so. As the Supreme Court noted earlier and repeated in *Lachance* "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly; but he cannot, with impunity knowingly and willfully answer with a falsehood."[25]

Fourth Amendment

Alan Shelby, an escaped prison inmate with a violent past, avowed that he would not do federal time. Following a lead provided by a reliable informant, federal agents observed a man outside the private residence of Hernan Ramirez whom they thought resembled Shelby. After obtaining a warrant, officers returned to the residence and simultaneously announced they had a warrant and broke a window of the garage through which they pointed a gun. The latter act was done in response to a warning by the informant that weapons were stored in the garage. Ramirez and his family were asleep at the time; and, thinking they were being burglarized, Ramirez ran to a utility closet, grabbed a pistol, and fired it into the ceiling of his garage. The officers fired back and shouted "police." When Ramirez realized it was law enforcement officials and not a burglar, he surrendered peacefully. Shelby was not found, but Ramirez, a convicted felon, was indicted for being in possession of firearms.

A federal trial court in Oregon granted Ramirez's motion to suppress the evidence regarding his possession of weapons charge, on the ground that the police officers violated his Fourth Amendment rights as well as his rights under 18 USC § 3109[26] because there were insufficient exigent circumstances to justify the destruction of property in the execution of the warrant. The Ninth Circuit affirmed based on its own precedent wherein it previously stated "[t]hat while a 'mild exigency' is sufficient to justify a no-knock entry that can be accomplished without the destruction of property, 'more specific inferences of exigency are necessary' when property is destroyed."[27] In applying this standard to the facts, the Ninth Circuit was satisfied that the heightened standard had not been met.

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[22] Lachance, *supra*, note 17, at 755.

[23] *Id.*

[24] It is interesting to note that the United States Supreme Court in Brogan v. United States, 118 S. Ct. 805 (1998), a case decided five days after the Lachance decision was announced, further solidified its position on these kinds of issues by holding that there is no "exculpatory no" exception for a false statement that consists of the mere denial of wrongdoing to criminal liability under 18 USC § 1001.

[25] Bryson v. United States, 396 U.S. 64, 72 (1969). *See* Lechance at 118 S.Ct. 753, 755 (1998).

On further review in *United States v. Ramirez*, the Supreme Court reversed on the basis that the standard of the Ninth Circuit was in error. Specifically, the Court declared that, "a no-knock entry is justified if police have a "reasonable suspicion" that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a "reasonable suspicion" exists depends in no way on whether police must destroy property in order to enter."[28]

Further elaborating on its reasoning, the Court contended that "by its terms § 3109 prohibits nothing. It merely authorizes officers to damage property in certain instances."[29] The Court also explained that:

> The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression.[30]

In applying the principle of reasonableness, the Court concluded that no constitutional violation had taken place on the part of the police officers. Although *Ramirez* applies primarily to law enforcement officials as they execute searches requiring warrants, it is important to keep in mind that in *New Jersey v. T.L.O.*[31] the Supreme Court designated officials in public schools as state officials who are subject to the Fourth Amendment for the purposes of search and seizure purposes in school settings.

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[26] 18 USC § 3109 provides that an "[o]fficer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[27] United States v. Ramirez, 91 F.3d 1297, 1301 (9th Cir. 1996).

[28] S. Ct. 992, 996 (1998).

[29] *Id.* at 997.

[30] *Id.* at 996.

[31] 469 U.S. 325 [21 Educ. L. Rep. 1122] (1985).

However, when they conduct school related searches, *T.L.O.* generally exempts school officials from the probable cause and warrant requirement replacing it with a carefully crafted reasonableness standard. Moreover, while *T.L.O.* did not specifically address unnecessary or excessive acts of property destruction in carrying out searches, *Ramirez* offers a clear indication or warning that when school officials do engage in appropriate *T.L.O.* searches and must destroy property in order to carry out the process, they should avoid excessive or unnecessary destruction of property. Under *Ramirez*, if school officials are not careful, it appears that their behavior is more than likely to be seen as a violation of the Fourth Amendment.

Free Speech

In 1989, controversial photographs that appeared in two exhibits funded by the National Endowment for the Arts (NEA) caused some public outrage. The NEA was criticized for funding controversial projects such as a collection of homoerotic photographs and a work entitled "Piss Christ" that consisted of a photograph of a crucifix immersed in urine.[32] In reaction to public outcry, Congress included amendment S954(d)(1) in the1990 reauthorization bill for the NEA. The amendment directed the NEA Chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[33]

Four performance artists brought suit against the NEA in a federal trial court in California. The respondents claimed that S954(d)(1) was unconstitutional on its face for violating vagueness principles and for impermissibly discriminating against speech on the basis of viewpoint, thus violating the First and Fifth Amendments. After the trial court granted the respondents' motion for summary judgment, the Ninth Circuit affirmed.

On further review, the Supreme Court, in *National Endowment for the Arts v. Finley,*[34] reversed and remanded in reasoning that S954(d)(1) was facially valid as it neither inherently interferes with the First Amendment nor violates constitutional vagueness principles. Justice Scalia's concurring opinion, which was joined by Justice Thomas, stated that while he agreed with the Court's judgment, he disagreed with its rationale. Justice Scalia wrote that the amendment was not vague and that although it established viewpoint criteria such as artistic excellence and merit, decency, and respect for diverse beliefs and values, the implementation of such standards was not unconstitutional.[35] In contrast, Justice Souter authored a dissenting opinion in which he commented that the amendment indeed violated the First Amendment's prohibitions against viewpoint discrimination while ignoring a long history of precedents outlining this prohibition.

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[32] Cited in National Endowment For the Arts v. Finley, 118 S. Ct. 2168 (1998).

[33] *Id.* at 2171.

[34] 118 S. Ct. 2168 (1998).

Educational entities, including institutions of higher education institutions which have art museums, should find *Finley* instructive in determining the types of policies that can be established based on a decency standard in artistic expression without violating the First Amendment. Additionally, *Finley*, together with *Hazelwood v. Kuhlmeier*[36] and *Bethel v. Fraser*[37] can potentially be read as demonstrating a continuing trend in which the Court has not been reticent to curb speech in various arena, including educational settings based on "decency" or lewdness standards, and also when an educational entity might desire to limit its "imprimatur" or responsibility for speech it does not wish to foster.

At the same time, educational leaders would do well to remember that this trend towards lessening free speech rights of students vis-a-vis administrative needs or desires for educational purposes has bounds. A case from a federal trial court in Missouri,[38] handed down in the last days of 1998, found that a student was improperly suspended by his principal for creating a personal web page on his own home computer that mocked school administrators. The Internet will continue to add to the fact patterns and rationales that will define speech rights in education in the future. In this case, the court seemed to be led by the older *Tinker* [39] rationale to determine that the student's suspension was not based on a likelihood of substantial disruption of the educational practices of the school, but was merely because the administration "disliked" or was upset by the speech. The court believed that administrators could not use the suspension resulting from unexcused absences to limit the student's grades or chances to graduate. The court also prohibited the district from limiting the student's right to maintain his web page. Although the court saw the district's behavior as an attempt to censor student private use of the Internet, the case is also troubling since clearly such a web page set up on a home computer has the potential of becoming a favorite site for students to visit from campus. Such decisions merit close scrutiny during the coming year.

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[35] *Id.* 2181-2184.

[36] 484 U.S. 260 [43 Educ. L. Rep. 515] (1988).

[37] 478 U.S. 675 [32 Educ. L. Rep. 1243] (1986).

[38] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp.2d 1175. [131 Educ. L. Rep. 1000] (1999).

[39] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

Health Plans / Insurance

When James Geissal lost his job at the Moore Medical Corporation, he was informed that the Federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) gave him the right to elect continuing coverage under the company's health plan provided he pay the premium. Geissal chose to continue the coverage but was told six months later that he was not entitled to the health plan benefit because when he elected to take the coverage, he was already covered by a group plan provided by his wife's employer. Moore based its action on the statutory language that allows an employer to cancel COBRA based coverage "[t]he date on which the qualified beneficiary first becomes, after the date of the election . . . covered under any other group health plan."[40] Geissal charged his former employer with violating his rights under COBRA. A Magistrate Judge in Missouri granted Moore's motion for summary judgment and the Eighth Circuit affirmed.

On further appeal, the United States Supreme Court agreed to hear an appeal in *Geissal v. Moore Medical Corporation* in order "to resolve a conflict among the Circuits on whether an employer may deny COBRA continuation coverage under its health plan to an otherwise eligible beneficiary covered under another health plan at the time he elects coverage under COBRA."[41] Upon review, the Supreme Court reversed the judgment of the Eighth Circuit in noting that the statutory interpretation advanced by both Moore and the panel failed to "square with the text."[42] Specifically, the Court remarked:

> Subsection 1162(2)(D)(i) does not provide that the employer is excused if the beneficiary "is" covered or "remains" covered on or after the date of the election. Nothing in § 1162(2)(D)(i) says anything about the hierarchy of policy obligations, or otherwise suggests that it might matter whether the coverage of another group health plan is primary. So far as this

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[40] 29 USC § 1162(2)(D)(i) [29 USCS § 1162(2)(D)(i)]

[41] 118 S.Ct. 1869, 1872 & n.4 (1998). *See and compare* Lutheran Hospital, Inc. v. Business Men's Assurance Co., 51 F3d 1308 (7th Cir. 1995) (an employer may not cease providing COBRA continuation coverage under its plan merely because its former employee has pre-existing coverage under another group health plan), and Oakley v. City of Longmont, 890 F.2d 1128 (10th Cir. 1989) (same), *cert. denied*, 494 U.S. 1082, with National Cos. Health Benefit Plan v. St. Joseph's Hospital, Inc., 929 F.2d 1558 (11th Cir. 1991) (an employer may suspend the COBRA continuation coverage of a former employee who had pre-existing coverage under another group health plan), and Brock v. Primedica, Inc. 904 F.2d 295 (5th Cir. 1990).

[42] *Id.* at 1874.

> case is concerned, what is crucial is that § 1162(2)(D)(i) does not speak in terms of "coverage" that might exist or continue; it speaks in terms of an event, the event of "becom[ing] covered." This event is significant, only if it occurs, and "first" occurs, at a time "after the date of the election."[43]

Insofar as public schools, colleges, and universities are all subject to COBRA, *Geissal* makes it clear that educational employers cannot deny COBRA coverage to an otherwise eligible beneficiary who was already covered by a second health plan such as one offered by a spouse's employer at the time he or she lost coverage.

Sexual Harassment

A male employee sued his former employer, his male supervisors, and co-workers claiming that sexual harassment directed at him by male co-workers in the workplace violated the prohibitions against discrimination "because of . . . sex" in title VII of the Civil Rights Act of 1964.[44] A trial court, relying on precedent from the Fifth Circuit, declared that a male could not maintain a cause of action under Title VII for harassment by male co-workers. However, the Supreme Court, in a unanimous opinion in *Oncale v. Sundowner Offshore Services*,[45] reversed and ruled that a male plaintiff could maintain a cause of action for harassment against a male employer and/or male co-workers. The Court pointed out that it had already declared in *Castaneda v. Partida*[46] that when racial discrimination is alleged, there is no conclusive presumption that an employer is incapable of discriminating against members of his own race. Reasoning by analogy, the Court asserted that there should be no conclusive presumption barring a claim under title VII simply because a plaintiff and defendant or the defendant's agents are of the same sex.

The Court carefully posited that a successful plaintiff must prove that the alleged conduct "was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] ... because of ... sex." The Court also cited previous cases, *Meritor Savings Bank, FSB v. Vinson*,[47] and *Harris v. Forklift Systems, Inc.*,[48] to explain that title VII:

> [D]oes not reach genuine but innocuous differences in the ways men and women routinely interact with members of the

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[43] *Id.*

[44] More specifically, the suit was based on 42 U.S.C. S 2000e-2(a)(1).

[45] 18 S. Ct. 998 (1998).

[46] 430 U.S. 482 (1997).

[47] 477 U.S. 57 (1986).

[48] 510 U.S. 17 (1993).

> same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.[49]

The Court added that the standard for determining the severity of harassment should be judged "from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."[50] In same-sex harassment cases, the Court indicated that determining the severity of harassment requires careful consideration of the social context surrounding the behavior involved so that "courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay . . . for discriminatory 'conditions of employment.'"[51]

Even though *Oncale* is set in the general workplace, the case becomes an influential precedent as the contours of sexual harassment law are defined in educational settings. *Oncale* may imply that school districts, institutions of higher education, and other similar educational agencies cannot safely ignore same-sex harassing behaviors, whether they involve employee-to-student, employee-to-employee, or even peer-to-peer harassment simply because they are same-sex behaviors.

In *Burlington Industries, Inc. v. Ellerth*[52] and *Faragher v. City of Boca Raton*,[53] the Court clarified the standards to be used to determine the basic outlines of hostile work environment liability. Specifically, the Court harmonized conflicting precedent in lower courts that had been used to stipulate when a supervisor's creation of a hostile work environment creates liability for the employer. In *Burlington*, Kimberly Ellerth quit her job as a salesperson for a division of Burlington Industries alleging that she had been subjected to constant sexual harassment by one of her supervisors, Tom Slowik. Burlington Industries described Slowik as a mid-level manager with authority to hire and promote employees but not to make policy. His alleged behavior included offensive remarks, gestures, advances, and comments that could be understood as threats to deny Ellerth tangible job benefits. Ellerth refused her supervisor's advances yet suffered no tangible retaliation and was, in fact, promoted.

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[49] Oncale v. Sundowner Offshore Servs, Inc., 118 S. Ct. 998, 1002-1003 (1998).

[50] *Id.* at 1003. *See also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[51] *Id.*

[52] 118 S. Ct. 2257 (1998).

[53] 118 S. Ct. 2275 (1998).

In May of 1994, Ellerth called Slowik about a request or concern for a customer and was told, "I don't have time for you right now, Kim—unless you want to tell me what you're wearing."[54] Ellerth ended the call, but, a day or two later called Slowik again regarding her request for the customer. Slowik denied the request but added a phrase described as, "something along the lines of, 'are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier.'"[55] Shortly thereafter, Ellerth's immediate supervisor cautioned her about returning telephone calls to customers in a prompt fashion. In response, Ellerth quit, giving reasons unrelated to sexual harassment. However, three weeks later, Ellerth sent Burlington Industries a letter explaining that she quit because of Slowik's sexually harassing behavior. Ellerth subsequently filed suit in a federal trial court in Illinois, alleging that Burlington Industries engaged in sexual harassment and caused her constructive discharge in violation of title VII.

The trial court granted Burlington's motion for summary judgment in finding that even though Slowik's behavior was severe and pervasive and created a hostile work environment, Burlington neither knew nor should have known of the manager's actions. The court observed that Ellerth never utilized Burlington's internal complaint procedure. In addition, the court analyzed but dismissed, the *quid pro quo* component of Ellerth's claim which, it believed, if proved would have made Burlington liable. Finally, the court rejected Ellerth's constructive discharge claim.

An *en banc* panel of the Seventh Circuit reversed in favor of Ellerth in a judgment that produced eight separate opinions that lacked a consensus for a controlling rationale. The judges were unable to agree on the standards for an employer's liability when dealing with *quid pro quo* harassment, especially when job retaliation was threatened but not carried out. The judges also disagreed on other fundamental issues including whether a uniform standard of negligence should be applied in all sexual harassment cases.

The Supreme Court agreed to hear an appeal in order to harmonize the lower courts and to define the relevant standards of employer liability in "a new and difficult area of federal law."[56] The Court noted that the terms *quid pro quo* and hostile work environment do not appear in title VII, and that they have been of limited use in making decisions regarding employer liability for employee actions under title VII. The Court also acknowledged that the terms originated in earlier case law and originally were useful in defining which types of claims were being brought: *quid pro quo* applied where a specific threat was carried out, and hostile work environment was utilized when there was offensive conduct that violated title VII but where no specific threat was actually carried out. The Court further recognized that these terms later came to be surrogates for determinations of the vicarious liability of employers since differing standards were applied in the two types of fact patterns. Generally, the circuit courts had held that when a plaintiff established a *quid pro quo* harassment claim, an employer was subject to vicarious liability for an employee's actions. Obviously, this encouraged plaintiffs to try to establish their claims as *quid pro quo* claims.

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[54] Burlington 118 S.Ct. 2257, 2262.

[55] *Id.*

[56] *Id.* at 2264.

The Supreme Court rejected the use of these terms along with their differing standards that developed over time to determine vicarious liability of employers. Instead, the Court turned to basic principles of the general common law on agency. When employees, acting as agents of their employer, are involved in sexual harassment, the court noted that the general rule is that because such employees are not acting within the scope of their employment, the employer generally is not liable. The Court noted, though, that there are instances when employees acting outside the scope of their employment bring liability to their employer for their tortuous actions. As such, the Court cited the basic common law agency exceptions from the Restatement (Second) of Agency Section 219(2) that will impose employer liability:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Based on fundamental agency law, the Court found that under the facts alleged in *Burlington*, subsections (b) and (d) were the only possible grounds for vicarious liability of the employer since there were no claims that the employer intended the harassing behavior. The Court also offered that Slowik was not alleged to be a high-level employee who could be said to be the alter ego of *Burlington* under basic agency law principles.

The Court ruled that the appropriate standard in *Burlington* and its companion case, *Faragher v. City of Boca Raton*, is that an employer is generally subject to vicarious liability when a supervisor with immediate or higher authority over an employee creates a hostile work environment. However, the Court decreed that when there is no tangible employment action taken against the interests of the complaining party, an employer may raise an affirmative defense that will negate the employer's vicarious liability. That defense, which must be proved by a preponderance of the evidence, includes both of the following elements: first, that the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior and that the plaintiff unreasonably failed to avoid harm, second, either by failing to take advantage of policies, procedures, or corrective opportunities provided by the employer or by unreasonably failing otherwise to avoid harm.

According to the Court, an employer does not need to prove as a matter of law that it developed a complaint procedure and policy to deal with sexual harassment in order to successfully use this affirmative defense. However, the Court did state that such issues would be an appropriate part of the arguments surrounding the establishment of the first element in a defense to a charge of harassment. The Court also remarked that in establishing the second element regarding the employee's obligation to exercise reasonable care to avoid harm, an employer usually can establish a defense if it can show that the staff member unreasonably failed to use complaint procedures the employer had established.

The Court's eschewing the labels of *quid pro quo* and hostile work environment notwithstanding, it maintained that this affirmative defense against vicarious liability is not available to an employer if an employee's action actually resulted in a tangible negative job action. In other words, the affirmative defenses are not available in cases that used to be called quid pro quo cases.

In *Faragher*, the Court used the standard enunciated in *Burlington*, and decided that the City of Boca Raton was vicariously liable for the actions of its employees in harassing the plaintiff. In analyzing the first element of the affirmative defense, the Court asserted that the City of Boca Raton did not meet its burden of proving that it had acted reasonably to prevent and correct harassing conduct by its employees.

Faragher had been employed as a lifeguard by the city and alleged that male supervisors had created a hostile work environment by subjecting Faragher and other female lifeguards repeatedly to uninvited and offensive touching and lewd remarks. The Court found that the record showed that the City failed entirely to disseminate its policy on sexual harassment to lifeguards, failed to oversee in any way the conduct of supervisors, and failed to include a mechanism or assurance in its policies that informed employees that they could file complaints with parties other than harassing supervisors. These facts demonstrated that the City failed to exercise reasonable care to prevent and promptly correct sexually harassing behavior as required under the first element of the affirmative defense outlined above and repeated in both *Burlington* and *Faragher*.

In *Faragher*, the supervisors' alleged behavior was much more extreme than in *Burlington*. Yet, as a matter of law, the dispositive points in *Faragher* were first, the failings in the procedures provided in the City's policy on sexual harassment, second, its failure to disseminate the policy, and third, its failure to oversee the behavior of Faragher's immediate supervisors. *Burlington* and *Faragher*, when viewed together, represent something of a simplification of the standards used to determine when an employer will be vicariously liable for harassing actions of its employees. Also, *Faragher* outlines the types of failings in policy preparation, dissemination, and supervisory oversight that will be seen as failure to exercise reasonable care to prevent and correct employees' harassing behavior.

Clearly, since *Burlington* and *Faragher* are based in employment law, they are relevant to educational entities qua employers. In addition, the somewhat clarified and simplified tests, affirmative defenses, and standards enunciated herein may also come to be applicable in educational settings over time including the arena of peer-to-peer harassment. These two cases provide guidance for the types of preventative actions schools should take to be able to avail themselves of the affirmative defenses outlined by the Court in cases dealing with sexual harassment in a variety of settings.

Conclusion

Although the cases in this chapter were selected specifically because they did not present themselves in educational institutions, the issues involved are relevant to educational leaders and those who counsel them. Some of the areas of law covered in this chapter are in a relatively steady state of change, such as issues involving artistic expression and speech of students, and search and seizure. However, other areas of the law seem to be changing more rapidly and more fundamentally, meriting close attention to the cases that will be decided by the Supreme Court and other appellate courts in the coming year. The two cases discussed in this chapter on sexual harassment, for example, could be read as setting the stage by the Supreme Court for further change in 1999 drawing a stronger distinction between title VII sexual harassment cases originating in employment law and settings and title IX and its impact on sexual harassment issues originating in education institutions. To track this area, the Supreme Court case of *Davis v. Monroe County Board of Education*,[57] argued in January 1999, bears close attention.

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[57] Davis v. Monroe County Board of Education, 119 S.Ct. 1661 (1999).

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AUSTRALIA

Douglas J. Stewart

Introduction

The first white settlers to arrive in Australia in January 1788 were comprised of convicts, military and government officials. Among them were a number of child convicts and thirty-six other children, seventeen of whom were the offspring of convicts while nineteen were the children of the marines.[1] Initially, the education that these children received was through the churches, particularly the Anglican, Roman Catholic, and Presbyterian churches. The schools were largely subsidized by colonial governors through land grants and small stipends to clergy rather than through direct financial support since there were severe restrictions on the funds allotted to the governors by the imperial parliament. In a number of instances, children were educated by former convicts. Even so, the schools that had been established by the early 1820s were increasingly funded at public expense although the education that they provided was, in most respects, extremely basic.

A Dual System of Elementary Schools

By the 1840s, support for non-denominational schools led to the implementation of a dual State/Church system in New South Wales and gradually in all the other colonies. There was, though, widespread opposition to the public funding of denominational schools that, together with sectarian rivalries, resulted in each of the colonies withdrawing all public funds to church schools during the 1880s. Perhaps, given the nature of politics, it should not be any great surprise to find that public funding for both capital and recurrent programs in non-government schools began to be implemented again in the 1950s. This, in turn, led to increased opposition, mainly from government school unions, and eventually resulted in a 1981 case before the High Court of Australia. In brief, the case, commonly known by its acronym *DOGS* (*Defence of Government Schools*),[2] revolved around public funding of non-government religious

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[1] Austin, A.E. (1972) Australian Education 1788 – 1900: *Church, State and Public Education in Colonial Australia.* Victoria: Pitman Publishing.

[2] Attorney-General for Victoria (*ex rel.* Black and Others) and Others v. Commonwealth of Australia and Others (1981) 33 A.L.R. 321.

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schools. The plaintiffs argued that such funding violated a clause of section 116 of the Commonwealth Constitution that reads in part: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

DOGS was important for two reasons. First, the High Court had not had any occasion to "determine the scope of the clause" that was modeled on the First Amendment of the United States Constitution and which the U.S. Supreme Court has interpreted as prohibiting funding of religious schools. Second, and of far greater concern to the schools involved, a decision against funding would have had serious political implications while putting the programs implemented by religious schools over a period of nearly twenty years and involving many millions of dollars at risk.[3] The High Court, in a six-to-one decision, ruled that funding of religious schools did not violate section 116 of the Constitution. It was evident that the majority considered that non-government religious schools were part of the school system approved by the states and that support of such schools was assistance to the states that were relieved of a financial burden to the extent of the assistance.

Secondary Schools

Secondary education, while provided for in some religious schools by the latter part of the last century, really only burgeoned in the 1950s. Today, almost eighty percent of students continue at school beyond the compulsory requirement, which is generally fifteen years of age except for Tasmania where children are required to attend school until they are sixteen.

Commonwealth Involvement in Schooling

Under the Constitution of the Commonwealth of Australia, which came into effect in 1901, the Commonwealth Government has no direct legislative responsibility for schooling in Australia. Yet, after the Second World War, the Commonwealth Government became involved in the provision of education for the two Territories (Australian Capital Territory and the Northern Territory) as well as for the Armed Services. Further, in 1945 a Commonwealth Office of Education was established to advise the Minister of Post War Reconstruction on matters related to education. Under its recommendations, schemes providing for the great number of migrants arriving from post-war Europe and Britain, scholarships for students beginning tertiary study, and post-graduate awards, were introduced.

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[3] Birch, I.K.F.(1984) "State-Aid at the Bar: The DOGS Case" Melbourne Studies in Education, pp.31-54.

In 1964, the Commonwealth Government became more directly involved in secondary schooling by offering ten thousand scholarships to students for their fourth and fifth (final) years at high school. In the same year, the Commonwealth provided funding for the improvement of science laboratories, science equipment, and teaching as well as improvements to school libraries. As these measures were to apply to all schools it is evident that the Commonwealth Government, largely for political advantage, had re-entered the field of funding denominational schools. Such funding has continued to increase each year to the point where it appears that, in some instances, non-government schools receive a greater level of funding than do some government schools. It is likely that this will be a source of continuing disquiet and potential future litigation.

School Law in Australia

Australian schools have, since the very early days, been influenced to varying degrees by a range of both statute and common law. Thus, for example, in 1828 in one of a number of unsuccessful libel actions, the newspaper, *The Australian*, was sued over comments it published concerning the Anglican Church and the church's use of the funds and grants that it received for the purposes of schooling.[4]

Litigation also took place over legislation introduced throughout the colonies to regulate and control schools in such matters as curricula, their location and number, and the extent to which religious instruction was permissible. Much of the early litigation contested the compulsory schooling provisions of the various Education Acts, particularly in relation to the high level of truancy that existed in the colonies and later in the early stages of the states that replaced the colonies in 1901. In some instances, since the early cases indicate the concern of a number of parents to provide home schooling for their children, there was acrimonious debate over what constituted an appropriate and adequate education. In addition, the early litigation indicated serious inadequacies in the extent and detail of the provisions contained in the Education Acts of the various colonies/states.

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[4] *The Australian*, 19 December, 1828.

Duty of Care for Students' Physical Welfare

Traditionally, Australians have not, by and large, resorted to litigation to resolve problems dealing with education. Therefore, in general, there is a limited amount of case law. As such, existing case law has overwhelmingly examined the duty of care that schools owe for students' physical welfare.

The first Australian case to do with physical injuries to a school student occurred in the early part of this century. In this case, a teacher was found negligent when he failed to provide a student with adequate safety instructions concerning the carrying of a beaker of diluted sulphuric acid and another student was seriously burned.[5]

There was not, however, a significant increase in the level of court actions involving allegations of school or Department of Education negligence until the 1970s. While data for the whole of Australia is not readily available, research carried out in the state of Victoria,[6] showed that in 1982 some fifty-three out of every 1,000 students enrolled in that state's schools were injured in school-related accidents and of that number, twenty-three out of every 1,000 received serious injuries. A similar level of school-related injuries was identified in research carried out with three hundred principals in government primary and secondary schools in the Australian state of Queensland.[7]

While no attempt is made here to identify and discuss all the cases that were decided, the more important rulings may be conveniently categorized as being associated with negligence issues dealing with the duty of care owed students in classrooms, school grounds, traveling to and from school, sport and school excursions.

Classrooms

A teacher and the school principal were held negligent when a student was paralyzed in a fight during a chemistry lesson.[8] The court was of the opinion that the teacher's duty encompassed more than proximity and foreseeability insofar as it arose through the need to protect a child of immature age against the conduct of others, or indeed of himself, which may cause injury. Other cases of classroom negligence have dealt with supervision and failure to confiscate potentially dangerous objects such as paper pellets[9] and a catapult[10] and student management where a student was pushed off of a chair.[11]

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[5] Hole v. Williams (1910) SR (N.S.W.) 638.

[6] Heffey, P. "The Duty of Schools and Teachers to Protect Pupils from Injury" *Monash University Law Review* 11/1 (1985), 1.

[7] Stewart, D. "Principals' Knowledge of Law Affecting Schools" *Australia and New Zealand Journal of Law and Education.* 1/1 (1996) pp. 111-129.

[8] Richards v. State of Victoria [1969] V.R.136.

School Grounds

In general, cases dealing with school grounds tend to include a more serious class of injury than those incurred in classrooms and are largely associated with lack of appropriate supervision. In one 1964 case, the High Court of Australia found that a teacher was negligent in the carrying out of his playground duty.[12] The High Court added that the principle of vicarious liability applied as much to teachers as to other professional groups.

More recently, teachers have been found negligent for late arrival at class[13] and inadequate ground supervision during lunch hour where an educator failed to confiscate a potentially dangerous implement.[14] The need to control the activities of known bullies is well accepted by most school authorities. In one case, a known male bully injured the spine of another student when he picked her up and then dropped her on a patch of concrete. However, the court decided that the incident occurred so quickly that it was likely even more adequate supervision would not have prevented it from happening.[15]

An important category of physical injury cases has to do with accidents on school grounds before classes commence for the day and after they have officially ended. An eight-year-old student who was passing through the school grounds about ten minutes before classes were due to commence received serious injuries when she was accidently hit on the head by a baseball bat wielded by another child. No staff had been assigned to supervise the children who were on the school grounds before classes began. The High Court held that there is a duty to ensure adequate supervisory arrangements are implemented when it is known or should be known that children are on school grounds.[16] This is of considerable concern in schools where children arrive early or stay late for non school-related reasons. Moreover, to roster teachers for early morning supervision sessions deprives them of the time required for lesson and classroom preparation. This situation is made all the more difficult by award employment agreements that generally require teachers to be at school only thirty minutes before classes commence and many children are frequently on school grounds well before this. A later decision of the High Court, in a case in which a fifteen-year-old student was injured when the top of the school flagstaff fell on him, confirmed that educators owe a duty of care to students who are on school grounds prior to the commencement of classes.[17]

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[9] Victoria v. Bryar (1970) 44 A.L.J.R. 174.

[10] Johns v. Minister of Educ. for South Australia (1981) 28 S.A.S.R. 206.

[11] Barker v. State of South Australia (1978) 19 S.A.S.R. 83.

[12] Ramsay v. Larsen (1964) 111 C.L.R.16.

[13] Evans v. Minister of Educ. for West Australia (1984) Australian Torts Report 80-670.

[14] Harvey v. Pennell (1989) 46 S.A.S.R.158.

[15] Warren v. Haines (1987) Australian Torts Reports 80-115.

[16] Geyer v. Downs (1977) 138 C.L.R. 91.

Traveling to and from School

Another area of concern to administrators is associated with the duty of care owed to students while they are on their way to or from school. In three recent cases, the courts stated that a duty does exist when there are circumstances that the school knows or should have known about that could lead to harm to students. For example, the Supreme Court of New South Wales noted that a duty of care existed in an incident that took place some seventy meters away from the school gate in which a student who was riding a bicycle was pelted by fruit thrown by a final year student and subsequently lost his sight in one eye.[18] In evidence it was clear that the practice of throwing fruit at junior students was an annual event, known to the school principal and other staff who, while not encouraging the practice, did little to stop it. The court also observed that even if a duty of care was not owed to the child as a student, then it would be owed to him as a normal road user. In a later case in the New South Wales Court of Appeal, a Catholic primary school was found liable for breaching its duty of care to a student who was injured while waiting at a bus stop one hundred meters away from school after classes ended. While the primary school student was waiting for a bus, an older student threw a stone at him, injuring him. The court found that the staff of the primary school knew that students walked to the bus stop which was near a high school, and that students from the high school occasionally threw objects at the younger children.[19]

The Queensland Court of Appeal recently held that a Brisbane government high school breached its duty of care obligation to a student who was injured while traveling to a school-related activity several kilometers from the school. An undertaking had been given to the student's parents concerning supervision while going to and from the venue.[20] However, in an earlier case, the Supreme Court of Tasmania[21] declared that educators did not owe a duty to a student who tried to board a moving bus outside of school grounds. The court pointed out that students had been constantly warned against this practice. The school was not held to be liable because the bus service was that of the normal council rather than one specifically provided for children from the school.

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[17] Commonwealth v. Introvigne (1982) 150 C.L.R. 258.

[18] Reynolds v. Haines Supreme Court, N.S.W. (Unreported, 27 October, 1993).

[19] Trustees of the Roman Catholic Church for the Diocese of Bathurst v. Koffmam, Court of Appeal, N.S.W. (Unreported, 9 August, 1996).

[20] Horne v. State of Queensland (1995) Australian Torts Reports 80-343.

[21] Stokes v. Russell, Supreme Court, Tasmania (Unreported, 18 January, 1983).

Sport

In sport, the main duty of care issues have been to do with failing to provide adequate supervision and instructions as well as for placing students in appropriate positions in contact sports teams. The high standard of care required in sports-related activities is evident in a case in which a highly experienced teacher was held liable for a student's injuries. The teacher became momentarily distracted and despite her arrangements for, and frequent reminders about their safety, a student was slightly injured after being hit by a baseball bat.[22] However, an appellate court South Australia asserted that a teacher was not negligent when, after she had instructed students to put a trampoline away and had left the area, a child who ignored her directives continued to use the apparatus and was injured.[23]

Teachers or school personnel are not the only one who come under scrutiny in physical injury cases. The Supreme Court of New South Wales concluded that the Department of Education was negligent for not disseminating information it had concerning the dangers of placing students with long necks in the front rows of rugby scrums. Here, a student suffered paraplegia when the scrum he was in collapsed, breaking his neck.[24]

School Excursions

Taking children away from school to attend a variety of curriculum-related activities has become common practice in contemporary education. Such events may be for only one or two hours in duration and may be in localities reasonably close to schools. Increasingly, however, excursions are taking place at considerable distances away from the schools and for extended periods of time. Regardless of distance and time away from the schools, most excursions place students in generally unfamiliar surroundings that create additional management concerns for school administrators and teaching staff. Expectations concerning the standard of care necessary for students who are on school excursions were defined in the County Court of Victoria in 1985 in a case in which one student died and another was injured while their class was on a bushcraft and camping weekend in rugged, steep, country in Victoria.[25] It is evident from this case that when students are on excursions, and particularly when engaged in hazardous activities, stricter supervision and meticulous attention to details such as pre-excursion planning, staff-to-student ratios, provision of detailed information to parents, and adherence to approved activities must be achieved.

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[22] Nally v. McWilliam, Supreme Court, Queensland (Unreported, 15 March, 1982).

[23] Bills v. State of South Australia (1982) 32 S.A.S.R. 312.

[24] Watson v. Haines (1987) Australian Torts Reports 80-94.

Summary

Clearly, the cases indicate that Australian courts hold administrators, classroom teachers, and educational authorities responsible for the physical well-being of students whenever the nexus between school and students is established. Thus, while the duty owed to students may be described as one of reasonable care, it is clear that it exists where there is a known or ought to be known presence of children on school grounds as well as in other educational settings and in circumstances where the relationship between students and schools arises. Such a relationship includes events away from school and at times outside normal class hours.

Emergent Issues

As previously noted, there is not a great body of case law associated with Australian schools. Additionally, the cases that do exist show that while schools have been involved in a range of legal matters, historically, the main issue has been to do with the duty of care owed for the physical welfare of students. More recently, however, students and their parents have shown a willingness to bring actions against administrators, testing long held school policies and practices, which go well beyond issues addressing the physical welfare of students. In essence, many of these actions concern what can loosely be called students' rights.

Students' Rights

Although Australia does not have a Bill of Rights or a Charter of Freedoms, a number of avenues may be utilized to achieve recognition for the rights of Australian citizens including children. Rights for Australian children have been given some degree of recognition since Australia signed the United Nations Convention on the Rights of the Child in December 1990. While the Convention has been breached on many occasions,[26] Australian courts have determined that the signing of the Convention implies a duty to follow the principles set out in its various Articles. Thus, the High Court recently held that an attempt by the Commonwealth to deport the father of six Australian-born children not only denied the children their rights to due process and natural justice, but also that the "best interests of the child" must be considered.[27] The Family Law Court has also accepted the principle that children have a right to be heard when their interests are at stake in proceedings under its auspices.[28]

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[25] Nicholas v. Osborne (1985) County Court, Victoria (Unreported, 15 November, 1985).

[26] Rayner, M. "Students Rights" in D. Stewart (ed) *Education, Law and the Future, Proceedings of the 5th Annual Conference of the Australia and New Zealand Education Law Association*. Brisbane: Queensland University of Technology Press, 1996.

Further recognition of children's rights has been secured through various tribunals. Thus, each of the States and the Commonwealth governments have established Human Rights and Equal Opportunity Commissions that have heard a small but increasing number of cases where students have alleged abuses of some of their rights. The decisions of these tribunals may be appealed, upheld, and enforced by appropriate federal or state courts.

School Curriculum

In the leading case concerning curricula offerings in government schools, a secondary school student successfully argued before the New South Wales Court of Appeal, in a decision on review from the Equal Opportunity Commission, that the curriculum offered at her school placed her, and all other students there, at a considerable disadvantage in relation to potential tertiary study and career options compared to those attending a nearby boys' school.[29]

Alternative School Programs

The question of alternative schooling for indigenous and minority students was considered in two leading cases that involved the closure of two schools that provided alternative educational programs mainly for Aboriginal children. Both cases gave rise to complaints of racial discrimination. The first case was heard by the Human Rights and Equal Opportunity Commission of the Northern Territory that found that the question of discrimination in access to schooling under the Racial Discrimination Act was restricted by the terms of the Act.[30] In the later case, two students successfully appealed a decision of the state government of Victoria to close the College that they attended and which also provided alternative education programs. The court ordered the school to reopen.

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[27] Minister of Immigration, Local Government and Ethnic Affairs v. Teoh (1995), 128 A.L.R. 353.

[28] *Re* K (1994) 121 ALR 436.

[29] Haines v. Leves (1987) 8 N.S.W.L.R. 467.

[30] Aboriginal Students' Support and Parents' Awareness Committee, Traeger Park Primary School v. Minister for Education, Northern Territory (1992) EOC 92-415.

The Supreme Court of Victoria upheld the judgment of the Equal Opportunity Board in light of the unique alternative educational program it offered to disadvantaged students, particularly Aborigines, since it agreed that the closure of the College was discriminatory.[31]

Rights are also recognized in Australia through the passage of a range of complex statutes in each of the States and Territories as well as by the Commonwealth government which, for example, cover various areas of discrimination. In this regard, all of the anti-discrimination legislation in Australia may be applied in varying degrees to education. The legislation contains provisions that deal with both direct and indirect discrimination and some statutes, such as in Queensland, contain provisions related to sexual harassment.

School Regulations

In the first anti-discrimination action of its type in Australia, a fourteen-year-old male student at a government coeducational school in Victoria initiated an action in that state's Equal Opportunity Commission challenging his suspension from school after he refused to have his hair cut to the school's regulation length.[32] The male, who argued that no similar regulation existed for girls, was granted an interim order that allowed him to return to school. Subsequently, he successfully defended the appeal brought by the Education Department in the Supreme Court of Victoria. At that point, the Victorian government passed amending legislation that allowed authorities in both public and private schools the right to establish their own regulations as to "reasonable standards of dress, appearance, and behaviour."

School Discipline

Until the last few decades, discipline, particularly that involving violence, in Australian schools, was not viewed as a major cause for concern. This is no longer so. Increasingly, schools, especially at the secondary level, are confronted by a range of disciplinary matters. It is becoming commonplace to find police officers being appointed to government schools in some areas while non-government schools frequently appoint "Masters" or "Sergeants" whose major task is to manage matters dealing with school discipline.

Although there is a lack of case law in this area, in one recent incident four students, including three Aborigines, were suspended and excluded from government high schools in the state of Queensland. The pupils disagreed with the principal for having suspended, and expelling, a fifth student who allegedly, among other things, struck a teacher. The Minister for Education then expelled the student from all government schools in the state. The five students, who later alleged that they had been racially discriminated against, sought an interim order in the Queensland Human Rights and Equal Opportunity Commission challenging their suspensions and expulsions. On appeal, a Federal Court ruled that, at that time, the Minister for Education only had authority to expel students from the specific schools that they attended and that he could not exclude children from all government schools.[33] The matter of racial discrimination was referred back to the Commission for further discussion but was dropped shortly thereafter without any further determination.

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[31] Sinnapan v. Victoria (1994) EOC 92-658; (1995) V.R. 242.

[32] Cope v. Girton Grammar Sch. (1995) EOC 92-680.

Student Harassment

It is evident from the cases that school personnel need to meet appropriate due process or fair dealing standards in order to ensure that their rights are not ignored. An area of potential concern in this regard is that of the duty of care owed to students to provide an education unhindered by various forms of harassment. Schools, for many years, have accepted a social responsibility to prevent various forms of bullying. However, this issue has recently become more contentious as recent research indicates that nearly 21% of boys and 16% of girls aged between 8 to 18 are bullied at least once a week in school settings.[34] In addition, there have been a number of out of court settlements associated with bullying. These cases indicate that school authorities must accept that they have a legal duty to ensure that their supervisory practices are adequate to prevent such incidents.

Sexual harassment is unlawful in all Australian States and Territories. In essence, the provisions of the legislation protect everyone from sexual harassment. Typical legislation is that of Queensland where sexual harassment is defined as occurring when a person is subjected to an unsolicited act of physical intimacy, a request for sexual favours, a remark with sexual connotations, or any other form of unwelcome sexual conduct where the harassment is carried out with the intention of offending, humiliating or intimidating another person, or where the harassed person sees the behaviour as offensive, humiliating or intimidating.[35]

There is a lack of school-related sexual harassment case law. Even so, it is clear that schools must implement clear, well-defined policies in relation to sexual harassment.[36] It is instructive on this point to note a 1996 incident in a government school in New South Wales wherein a fourteen-year-old "self confessed" homosexual alleged that he was sexually harassed by both staff and students. Although the student complained to school staff about the harassment on many occasions, nothing was done to prevent it from continuing. As such, the student left the school even though he continued to receive and complete school work at home. The student has yet to initiate any further action.

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[33] Carson v. Minister for Education for Queensland (1989) 88 A.L.R. 467.

[34] Rigby, K & Slee, P (1998) "Bullying in Australian Schools." In P. Smith (Ed.) *The Nature of School Bullying*. London: Routledge.

[35] Anti-Discrimination Act 1991 (Qld).

Tactility

Principals in Australian schools generally advise teachers not to touch children. Indeed, it is also common for this advice to be emphasised during pre-service teacher education courses as well as when teacher education students are on Practice Teaching periods in schools. This advice is particularly pertinent in view of the fact that there have been several recent Australian inquiries into allegations of pedophilia that have revealed considerable abuse, sexual and otherwise, against children. Teachers in both government and non-government schools have frequently been implicated in the inquiries with consequent media attention given to the problem. On the other hand, there is an awareness that teaching is a profession in which acceptable touching of students is a normal part of everyday activities. This is particularly the case at the elementary level but also applies in high schools in activities such as gymnastics where teachers are often required to act as a "spotter" in order to ensure student safety.

The Queensland Court of Appeal recently noted that touching of children was an acceptable behaviour by teachers as long as a student has not, either explicitly or impliedly, withdrawn their permission to be touched.[37] Obviously, any touching of children for an indecent purpose, or in any unlawful way, removes any legal protection that a teacher might have.

Educational Negligence

The possibility of a successful action in educational negligence which, simply defined, arises when there has been some harm occasioned to a student by incompetent or negligent teaching, has been canvassed in Australia for some years. Indeed, the Hon. Mr. Justice M. Kirby, recently appointed to the High Court of Australia, has commented on a number of occasions dating back to 1982 that he can see no reason why Australian teachers should not be held responsible for negligent teaching. He has pointed out that if teaching is to claim the status of a profession, administrators and classroom practitioners alike have to face the consequences of being accountable for their work.[38] While there are no reported cases of educational negligence in Australia to date, the likely legal conditions needed to give rise to a successful action may be speculated on by the discussion of this issue in courts in the United States and the United Kingdom.[39]

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[36] Chambers v. James Cook Univ. (1995) EOC 92-683.

[37] Horan v. Ferguson (1995) Qld R 490.

Students with Special Needs

All Australian anti-discrimination legislation contains provisions dealing with discrimination against individuals with special needs in educational settings. Thus, for example, a Commonwealth statute prohibits discrimination based on disability in education. There are similar provisions in state statutes such as in Queensland that prohibit discrimination in ten areas, including education, on the basis of thirteen attributes including sex, age, race, religion, and disability. The statutes identify and prohibit both direct and indirect discrimination while providing exemptions under certain circumstances.

It is likely that there will be a considerable increase in the number of cases involving children with special needs centered on identification, placement, resources, and the appropriateness of the provisions being offered. A case illustrative of the issues that are beginning to arise concerned "L" a seven-year-old student with severe mental and physical disabilities. "L" had been placed in an integrated double teaching class but was suspended both for her continual disruptions of other children and due to inadequate resources including special needs-trained teachers. The child's parents contested her removal and replacement in a class for children with special needs by taking their complaint to the Queensland Anti-Discrimination Tribunal. This tribunal agreed that while "L" had been discriminated against under section 44 of the Anti-Discrimination Act (QLD), it was not unlawful because her retention in the classroom caused "unjustifiable hardship" to the other students.[40]

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[38] The Hon. Mr. Justice M. Kirby, "Legal and Social Responsibilities of Teachers." Address to teachers of the Whyalla School District, South Australia, 22 March, 1982; and "Education and the Law" Address to the 3rd Annual Conference of the Australia and New Zealand Education Law Association, Brisbane, July 1994.

[39] These issues are extensively addressed in Ramsay, I. & Shorten, A. (1996) *Education Law*. Sydney: Butterworths; Hopkins, D. "Suing for Careless Teaching: Are the Storm Clouds Gathering?" in D. Stewart (ed.) *Education Law and the Future*. Proceedings of the 5th Annual Conference of the Australia and New Zealand Education Law Association, (Brisbane, Queensland University of Technology Press, 1996) pp 19-29; and Williams, P. "Educational Negligence: An Australian Perspective." Working Paper Series (School of Business Law, Curtin University, Australia) 1995.

[40] "L" v. Minister for Educ. (1996) EOC 92-787.

In another case before the Equal Opportunity Commission, an eighteen-year-old student who is deaf and blind brought an action against the Queensland Department of Education when it refused his request to remain in the government special school that he attended. Department Regulations only provided education for children with such needs until they reached eighteen years of age.[41] The student claimed that this violated the anti-discrimination legislation and the Education Act that allowed students without disabilities to remain at school beyond eighteen years of age. Legislation has since been enacted to remove this area of discrimination.

Free Speech

Australia does not have a Bill of Rights. At the same time, the High Court has generally been reluctant to imply any recognition of rights in the Constitution. Further, any national referendum seeking to introduce a Bill of Rights has been defeated. In addition, there is a lack of case law involving educational institutions on the important issue of free speech. However, Australia is a signatory to the United Nations Convention on the Rights of the Child and while its provisions have not been directly translated into domestic legislation, there is a growing body of opinion giving support to various articles of the Convention. Thus, for example, Article 12 (the right to express views freely), Article 13 (the right to freedom of expression), Article 14 (the right to freedom of thought, conscience and religion), and Articles 28 and 29 (on the provision of education) may in the future have considerable impact on court decisions to do with free speech issues.

Free speech in relation to teachers, whether concerning curriculum or other professional matters, has not been a major issue tested before Australian courts. As such, it appears that teachers accept their role without questioning such matters. There is, however, a high level of teacher union membership as the union is actively involved in protecting teachers' rights across a range of areas.

Violence and Discipline

It is useful to reiterate the point that in Australia, matters dealing with violence and discipline in schools have largely been managed and contained within the school setting without recourse to the law, in particular, the courts. What litigation has occured has largely focused on the failure of the schools to provide adequate supervision.

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[41] Hashish v. Minister of Educ. (1996) EOC 82-806.

Miscellaneous

Management of government schools, like those in the non-government sector, is, in most of the Australian States and Territories, devolving to the school level. Consequently, it may be expected that issues to do with powers of school principals or school boards to "hire and fire" teaching staff will come under increasing judicial scrutiny.

CANADA

Anwar (Andy) N. Khan

Introduction

This chapter describes significant recent developments in Canadian education law while, at the same time, observing the historical backdrop under which it has taken its shape. The chapter starts with an examination of the constitutional setting of education law in order to place the recent developments in their proper fundamental context. It then reviews important facets of education law, particularly in view of the recent judicial pronouncements, before explaining two landmark judgments handed down in 1998 by the Supreme Court of Canada.

Constitutional Background

Canada, being a federation similar to the United States,[1] has federal and provincial (state) governments. The British North America Act, now renamed as the Constitution Act of 1867, established the basic framework of the federation by giving various powers to each arm of the government. Under the 1867 scheme, education was given exclusively to — and has remained with — the provinces. The important recent development is that in 1982 Canadians "repatriated" their Constitution from the United Kingdom, and, in line with their immediate southern neighbor, provided for constitutionally-entrenched fundamental rights and freedoms.[2] Thus, the Constitution Act of 1982, which contains the

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[1] While many judicial precedents relating to the American Bill of Rights have become relevant in the interpretation of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada is fully aware that Canadian solutions have to be found for Canadian problems. For an example, *see* the extra-judicial view of Justice Iacobucci: *The Daily Globe and Mail*, March 25,1999.

[2] In 1960, Canada tried to introduce fundamental rights and freedoms with the Canadian Bill of Rights. Even so, no changes in the provision and system of education resulted because the courts treated the Bill like any other statutory provision — and not as introducing constitutionally-entrenched rights and freedoms.

Canadian Charter of Rights and Freedoms,[3] ushered a new era of fundamental and constitutional rights and freedoms, whereby courts started playing a significant and major role in delineating and demarcating, among other items, educational rights and obligations, reshaping educational policies, and redefining educational practices.

In recent years, therefore, educational law has been "constitutionalized" and "Americanized." The new constitutional framework, in particular the interpretation and application of the Canadian Charter, has resulted in the introduction of new rights and freedoms that, while not abrogating a number of previous policies and practices, law-makers and policy-makers cannot ignore. One of the fascinating consequences of these changes is that the law of education has become a subject of intense interest and appeal. Its evolutionary attribute has taken a new and legalistic shape. Canadian education law remains important as a practical legal concept that affects the many rights and duties of parents, students, teachers, governments, local education authorities and others.

The English-speaking and French-speaking peoples of Canada have always acted to preserve their language and culture. Both have rightly perceived education as the best means of protecting and perpetuating their own culture. The Constitution and law have always been used to give protection to the two linguistic cultures. Thus, schools have played, and continue to play, a vital role in preserving and encouraging linguistic and cultural vitality.

A very important provision of the Canadian Constitution now is section 52 of the Constitution Act 1982 that lays down that it, with the Canadian Charter of Rights and Freedoms, is the "supreme law of Canada" and any laws that are inconsistent with it are "of no force or effect." The expected consequence has been that many aspects of educational law and practice have been challenged in courts, and, as is the case with the United States Supreme Court, the Supreme Court of Canada plays a major role in legal developments. The repercussions are that the Canadian courts have been brought into the arena of defining and framing educational policies and practices, which has resulted in the "politicization" of the judiciary. The judiciary now plays a role, sometimes as important as the legislature, in establishing educational policies and rights. Some maintain that, as there is no direct federal educational law-making provision in the Constitution, this has a positive effect in establishing a uniform system of education law. The judiciary has been given that significant role by the Canadian Charter of Rights and Freedoms, particularly if one examines the wide and liberal language used in section 24 (1) that lays down: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

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[3] The provincial government of Québec did not agree with the changes in 1982, and, about a year earlier, in 1981 even went to the Supreme Court of Canada to, unsuccessfully, stop the whole process. The present provincial government, with a view to secede from Canada, conducted a referendum. The vote was close, but the majority rejected separation. The provincial government now wants representation on many international bodies, for example United Nations Educational, Scientific and Cultural Organization, but the federal government rejects such demands. *See The Globe and Mail*, March 26,1999. The First Nations people also are not happy with the 1982 Constitution and with their present plight.

The role of superior court judges in describing, defining, demarcating, and delineating educational rights and freedoms becomes even more important when one considers that the Canadian Charter of Rights and Freedoms provides and explains that the rights and freedoms given by the Charter are not unlimited or unrestricted. Section 1 of the Charter states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The decision whether a limitation is permissible had been granted to the courts. The Supreme Court of Canada has established detailed criteria in this respect.[4]

Some Important Features of Canadian Education Law

It is appropriate here to summarize some of the fundamental characteristics of Canadian education law. Further, it is worth remembering that, because of the historical facts, Canadian law of education has been greatly influenced by the British law. However, the American influence has been on the increase, especially since the introduction of the Canadian Charter of Rights and Freedoms. Reflecting the American Bill of Rights, the Canadian Charter of Rights and Freedoms aims to provide fundamental, entrenched and inalienable rights and freedoms. The Charter has affected many aspects of Canadian life, including education, thereby increasing the constitutionalization and legalization of education.

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[4] *See* A.N. Khan, "Interpretation of the Canadian Charter of Rights and Freedoms" (1995) LII Punjab University Law Journal 15-26; A.N. Khan, "The Canadian Charter Does not Provide Unlimited Rights and Freedoms" (1996) LIII Punjab University Law Journal 44-62.

Provincial and Federal Roles in Education

Canada has one federal, ten provincial, and two territorial governments.[5] As such, the system of government that the Canadian Constitution provides is based on division of powers and responsibilities between federal and provincial parliaments and governments. Under section 93 of the 1867 Constitution Act, education is given exclusively to the provinces, thus the provinces have a crucial role in primary, secondary, and post-secondary education. Provincial educational legislation, among other provisions, creates local school boards and trustees. However, the school boards, as creatures of the province, have no constitutional entrenchment.[6]

The provincial legislation normally facilitates collective bargaining between school boards and teachers' unions and arbitration in cases of disputes.[7] Arbitrators and arbitration boards/tribunals have always been granted judicial deference. The Ontario Court of Appeal has recently reconfirmed this principle, because the grievance arbitration is "to secure the prompt, efficient and cost-effective settlement of disputes arising out of the interpretation and application of collective agreements."[8] According to this principle, unless an arbitrator's decision is patently unreasonable, it cannot be reviewed by the courts.

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[5] In the Canadian East Arctic, the third territory, Nunavut, has been created from April 1,1999. This has been done by splitting Northwest Territories into two. This will be culmination of many years negotiations, and will be the largest land-claims settlement in Canada: *The Globe and Mail*, March 29, 1999.

[6] For an example, *see* Re Attorney General of Ontario and Ontario Pub. Sch. Boards' Ass'n et al (1997) 151 D.L.R. (4th) 346.

[7] Where the provincial legislation gave a Minister of Government the power to change teachers' conditions of employment after their collective agreement had expired, the Minister could not do so retroactively: Northwest Territories Teachers' Ass'n v. Northwest Territories (1998) 153 D.L.R. (4t) 79.

[8] Ontario English Catholic Teachers' Ass'n v. Lanark et al (1998) 164 D.L.R. (4th) 429. *See also* Trent University Faculty Ass'n v. Trent University (1997) 150 D.L.R. (4th) 1; Retail, Wholesale and Department Stores Union Local 544 v. Peters [1998] 1 S.C.R. 1118. On the interpretation of the teachers' superannuation, *see* Ontario v. Ontario Teachers' Pension Plan Board (1998) 167 D.L.R. (4th) 308. For some previous developments, *see* A.N. Khan, "Exclusive Labor Arbitration in Canadian Academia" (1990) 21 Journal of Law & Education 549-560. The Alberta Court of Appeal, breaking new ground, has held that where the governing board of a college is empowered by statute to change staff designation after consultation with the staff association, the word "consultation" involves a bilateral interaction by parties informed of each other's position where each has an opportunity to give and receive information: L.C.F.A. v. Lakeland College (1998) D.L.R. (4th) 338. The Court said that "the power to determine which positions fulfill the teaching function is one of the most important made by an educational institution....Exercising the power to designate could remove benefits under the collective agreements." The Supreme Court of Canada has recently reiterated that labor arbitrators' decisions must be given judicial deference, unless their decision is patently wrong. Pushpanathan v. Canada (Minister of Citizenship and Immigration) (1998) 160 D.L.R. (4th) 193 (S.C.C.).

Although the federal government has no direct educational jurisdiction, it can influence educational direction in many ways because of its powers in bilingualism, multiculturalism, Indian Reserves education, international relation, and of course the purse strings — to this end, the federal government has recently allocated huge sums of money for research and student scholarships. However, the primary role in education is played by the provincial governments.

Multicultural Education

Canadian history has some deplorable examples of blatant racial and sex discriminatory laws. However, in recent years, Canada has been trying to be a tolerant and equality-minded country[9] and has been endeavoring to have multicultural, multi-ethnic, and secular educational practices and traditions.[10] In recent years, the Canadian governments have paid more than lip-service to positive multicultural educational principles, programs and policies. This is due in part to the increasingly diverse ethnic and cultural backgrounds of the Canadian population.[11] The Canadian Charter of Rights and Freedoms, in section 27, which is an interpretation tool, provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada." In 1988, reflecting the mood and spirit of the contemporary times, the Canadian Federal Parliament, with a view to improve the federal administrative policies, passed the Multiculturalism Act for the promotion of multicultural continuance. These developments can provide positive place and precedents when it comes to education.

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[9] According to Bissoondath, mere tolerance is not sufficient in the building of a cohesive society. The goal should be acceptance of differences. "Multiculturism seems to offer at best provisional acceptance, and it is with some difficulty that one insists on being a full — and not just an associate — member of society. Just as the newcomer must decide how best to accommodate himself or herself to the society, so the society must in turn decide how it will accommodate itself to the newcomer": Selling Illusions: The Cult of Multiculturism in Canada (Toronto, Penguin Books, 1994).

[10] For details, comparisons and criticisms of these developments, *see* J. Laponce & W. Safran, ed.,Ethnicity and Citizenship: The Canadian Case (London, Frank Cass, 1996);W. Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (New York, Oxford University Press, 1995); J.G. Reitz & R. Boston, The Illusion of Difference: Realities of Ethnicity in Canada and the United States (Toronto, Howe Institute, 1994); I.W. Berry & J.A. Lapone, eds, Ethnicity and Culture in Canada: The Research Landscape (Toronto, University of Toronto Press, 1994); A. Wayne MacKay & M. Chantal Richard, "Multiculturism: Who Needs It?" (1998) 8(3) Education L.J. 265-293.

[11] Some people are quick to blame minorities — for example linguistic, religious, visible, ethnic, racial or aboriginal — for the societal ills of Canada. "The fact that visible minorities are allowed and encouraged to maintain their cultures and assert their political rights is...blamed on the government's policy of multiculturism. To blame so many of Canada's social ills on the 'cult of multiculturism' is unwarranted and it exaggerates the potency of government policy. Many present tensions in Canadian society arise naturally out of the process of accommodating and accepting cultural diversity. Official multiculturism does not afford any special status to ethnic minorities in Canada. Many popular examples of a nation stretched to the limit by the demands of diversity are, in fact, merely situations where an individual is seeking the protection of rights which are guaranteed to him or her by human rights legislation and the Charter. While there are some valid concerns about limits of accommodating diversity, these concerns often appear to have racial overtones" MacKay & Richard, *ibid.*

Freedom of Religion

Section 2(a) of the Canadian Charter guarantees "freedom of conscience and religion."[12] In line with the American "freedom of religion,"[13] this provision can have a significant impact on some aspects of education. Parallel to American developments,[14] Canadian courts have held that the prayer-regulations, which required public schools to open with the Lord's or other prayer, or passages from the Bible or other suitable readings with exemptions for children of non-Christian faiths, are unconstitutional. The Ontario Court of Appeal said that the requirement of religious education in public schools:

> imposes on religious minorities a compulsion to conform to the religious practices of the majority . . . . The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority values . . . . We consider [the regulations under the Education Act] also infringe freedom of conscience and religion in a broader sense. The requirement that pupils attend religious exercises, unless exempt, compels students and parents to make a religious statement . . . the effect of the exemption provision is to discriminate against religious minorities . . . the exemption provision imposes a penalty on pupils from religious minorities who utilize it — by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of a dominant religion.[15]

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[12] For details and analyses, *see* A.N. Khan, "Canadian Education: The Legal Position of Religion" (1998) 20 Liverpool L. Review 141-160.

[13] For detailed analyses, *see* D. Shivakumar, "Neutrality and the Religion Clause" (1998) 33(2) Harvard Civil Rights-Civil Liberties L. Review 381-442.

[14] *See* School Dist. of Abington Township v. Schemp 374 U.S. 203 (1963) in which daily Bible reading in public schools was struck down as unconstitutional.

[15] Zylberg v. Sudbury (Bd. of Educ.) (1988) 52 D.L.R. (4th) 577.

In a later case,[16] the regulation provided for two periods of religious instruction each week in public schools although parents who so wished could have their children exempted. When some parents objected, the education authority raised the defense that practice of religious instruction equals teaching children about morality. The courts rejected this argument and suggested that there were other effective methods to teach children about morality without imposing Christian practices on them. However, provided the line between indoctrination and education was not crossed, the courts have decided that there is no prohibition in the law on the teaching about religions. Therefore, schools are free to have programs in religion, but must not indoctrinate, and must not give primacy to any particular religious faith.

On the reverse side, in another case,[17] a multi-faith group of parents argued that the prohibition of religious instruction in public schools was unconstitutional because it infringes on their freedom of religion granted under the Charter. A three-judge panel of the Ontario Court of Appeal, while sympathizing with Sikh, Hindu, Muslim, and Christian parents, who contended that the survival of their cultures and religions is endangered by having to send their children to secular public schools, dismissed the case. The unanimous Court asserted that "while we sympathize with the concerns of the appellants about the positive and negative influences of the educational experience on their children, their plight is no different from that of the majority of Canadians who cannot afford, or do not wish, to send their children to privately funded religious schools." The Court decided, "[n]o freedoms have been violated. The problem for these parents and others is that the province has decided not to fund religious schools."[18]

Another aspect of the freedom of conscience and religion is that, in a multi-religious country like Canada, education authorities have to make reasonable accommodation for minority religious beliefs such as giving a day off on a religious annual holy day.[19]

Yet another area where freedom of religion and conscience has become relevant is in relation to public funding of private religious schools. The Constitution Act 1867 protects denominational schools that existed at the time of the Confederation in 1867 (without this "deal" there may have been no confederation).[20] Therefore, a constitutional anomaly was created whereby public funds were provided only to two types of religious schools: Protestant and Catholic. After the advent of the Canadian Charter, some parents who belonged to other religious faiths claimed in courts that this was an infringement of their freedom of religion and also was an infringement of the Equality provision. However, the lower courts gave a short shrift to such claims.[21] The Supreme Court of Canada confirmed that one part of the Constitution cannot be used to interfere with rights protected by a different part of the Constitution. The Court added that freedom of conscience and religion guarantees everyone to pursue their religion or belief (or no belief) but does not lay down that state funding has to be provided for private religious education. The court reasoned that if parents wish to educate their children in private religious schools, they are completely free to do so, provided they are willing to pay for it.[22]

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[16] *See* Civil Liberties Ass'n v. Ontario (Ministry of Educ.) (1990) 65 D.L.R. (4th) 1.

[17] Bal et al v. Attorney General of Ontario (1997) 151 D.L.R. (4th) 761.

[18] *See* A. N Khan, *supra*, note 12.

[19] *See* A. N. Khan, "Canadian Education Authorities' Duty to Make Reasonable Accommodation for Religious Beliefs" (1998) 9(4) Education and the Law, 307-319.

[20] Section 29 of the Charter states that no provision of the Charter "abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".

A final aspect of the freedom of religion relates to the conflict between some parents' insistence that the secular public education contravenes their religious beliefs. Based on this contention, certain parents violated provincial truancy laws by refusing to send their children to public school and teaching them at home without agreeing to any inspection by the school board. So far, the courts have come down in favor of reasonable truancy laws and reasonable inspections of private and home education.[23]

Language and Denominational Schools

Canada's two official languages, resulting from the country's bicultural tradition, have constitutional protection. This protection now has been reiterated and reconfirmed in sections 16-22 of the Canadian Charter. For example, section 16 lays down that both English and French as the official languages have "equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." Similarly, section 23 provides for the protection of minority-language education rights. It lays down that, where numbers warrant, "[c]itizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which reside . . . have the right to have their children receive primary and secondary school instruction in that language in that province."[24] In two cases, the Supreme Court of Canada[25] has provided detailed guidelines in this respect[26] and has said that this section puts a constitutional stamp of approval on the majority's ability and willingness to accommodate the concept of official bilingualism. It is differential treatment to use either English or French as a minortiy language. However, the dissimilar treatment is permissble for the preservation of linguistic minority's language and culture.

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[21] Adler v. Ontario [1996] 3 S.C.R. 609.

[22] *See* A.N. Khan, *Supra* note 12

[23] *See* A. N. Khan, "'Liberty' and Education in Canada" (1993) 5(2) Educ. and the Law, 95-106.

It is now well recognized and established in Canada that language is a means by which people express their cultural identity and that minority language schools can provide community centers for the promotion and preservation of their respective cultures, so that the language can flourish in provinces where it is not spoken by the majority. The only problem is that this noble recognition does not apply or extend to any other minority languages other than English and French.

The confederation compromise made in 1867 preserved denominational (i.e. Roman Catholic and Protestant) schools.[27] Some provinces now maintain that the dual educational and taxation system is uneconomic and inefficient.[28] A good recent example is the province of Newfoundland, which, after a plebiscite, amended the law by its Schools Act 1997, mandating a secular school system. In response, some Roman Catholics have started legal proceedings maintaining that the amendments are unconstitutional. The proceedings are making normal judicial progress upwards.[29]

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[24] *See* A.N. Khan, (1994) "Minority Education Language Rights in Canada," 23(2) J. of L. Educ., 399-412.

[25] Mahe v. Alberta [1990] 1 S.C.R. 342; Reference Public School Act (Manitoba) 2. 79(3), (4) & (7) [1993] 1 S.C.R. 839.

[26] These detailed guidelines have proved useful in subsequent cases. For example *see* the 1998 British Columbia Court of Appeal case: L'Association des Parents Franchophones Colombie Britannique et al. v. British Columbia (1998) 167 D.L.R. (4th) 534. The lower court's decision is reported at [1997] 5 W.W.R. 124

[27] Not all provinces are bound by the constitutional requirement of denominational schools, because they joined the confederation after 1867. For some historical and other details, *see* Reference re an Act to Amend the Education Act (Ontario) [1987] 1S.C.R. 1148; Public School Boards Association of Alberta v. Alberta (1998) 158 D.L.R. (4th) 267; Reference re Education Act (Québec) [1993] 2 S.C.R. 511; Greater Montreal Protestant School Board v. Québec (Procureur general) [1989] 1 S.C.R. 377. *See also* T. Sale, An Analysis of School Funding Across Canada (Vancouver, EduServ, 1993).*See also* W.A. McKim, ed., The Vexed Question: Denominational Education in a Secular Age (St. Johns, Breakwater, 1988); C.B. Sisson, Church and State in Canadian Education (Toronto, Ryerson Press, 1959).

[28] *See* R.C. Maybank, "Have Constitutionally Protected Denominational Guaratnees Inhibited the Modernization of Education" (1998) 8(3) *Education & Law Journal* 315-358.

In order to rationalize the school system, Ontario amended its Education Act by the Education Quality Improvement Act 1997 and the Fewer School Boards Act 1997, that, among other changes, centralized educational governance and funding. A new funding formula was established which provides public and separate (i.e. Roman Catholic) school boards equal access to revenue on a per student basis, thus removing the taxation power from Protestant and Catholic School Boards. These provisions are also under constitutional challenges.[30]

Discrimination

A society where discrimination on the basis of immutable personal characteristics, for example, of race, gender, or color is rampant and legally tolerated is unlikely to be characterized as truly democratic. In education, equality and non-discrimination are even more important. As such, all advanced countries have enacted, and enforce, anti-discrimination laws. Canada is no exception. While all Canadian federal and provincial jurisdictions have enacted human rights legislation that prohibits discrimination, all legislation are subject to the Canadian Charter, which includes a comprehensive provision on Equality. Section 15 of the Charter has the potential to impact upon, affect or influence many educational decisions, determinations, policies and procedures and reads

> EQUALITY RIGHTS: 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or

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[29] *See* Hogan v. Attorney General of Newfoundland et al [1998] 163 D.L.R. (4th) 672; Hogan v. Newfoundland (Attorney General) [1997] 156 D.L.R. (4th) 139; Hogan v. Newfoundland (School Board for Ten Districts) [1997] 149 D.L.R. (4th) 468; Elliott & School Board for Dist. 7 et al [1998] 161 D.L.R. (4th) 112; Tracey v. Avalon East School Board [1998] 80 A.C.W.S. (3d) 1020; Oxford v. School Board for District 3 [1997] 155 Nfld & P.E.I.R. 299. In the province Alberta also reorganization took place by statutory changes and constitutional objections were raised. *See* Public School Boards' Ass'n of Alberta v. Alberta (Attorney General) [1998] 158 D.L.R. (4th) 267. All of these questions will have to be resolved by the Supreme Court of Canada.

[30] *See* Ontario English Catholic Teachers' Ass'n et al v. Attorney General of Ontario et al (1998) 162 D.L.R. (4th) 257 (Court of Appeal); (1997) 151 D.L.R. (4th) 346 (Ontario General Division); Re Berthelot et al (1999) 168 D.L.R. (4th) 201. *See* J. Paquette, "Re-Engineering Ontario Education: The Process and Substance of Harris Reforms in Education in Ontario" (1998) 9 Education & Law Journal, 1-14.

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> ethnic origin, color, religion, sex, age or mental or physical disability.
>
> 15 (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability.[31]

As can be observed, section 15(1) provides for enumerated grounds, and, because of the phrase "in particular," "analogous" grounds (to be developed by the courts). The innovative section 15(2) sanctions, when absolutely necessary and in limited circumstances, affirmative action.[32]

Insofar as section 15 does not provide meanings of "discrimination," it was left up to the Supreme Court of Canada to do so. In the first case it decided on section 15,[33] the Court defined "discrimination" by writing that

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concerns, respect and consideration. It has a large remedial component . . . .
>
> Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the

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[31] Section 15 came into force three years after the other provisions of the Canadian Charter.

[32] For the United States developments in affirmative action in higher education, *see* G. Liu, "Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test" (1998) 33(2) *Harvard Civil Rights-Civil Liberties Law Review* 381-442.

[33] Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143.

> basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[34]

Madam Justice L'Heureux-Dubé, in a 1996 education case,[35] elaborated that in determining whether discrimination has taken place one has to reconstruct the context in which the distinction arises. She amplified that two categories of factors are particularly instructive:

> (1) The nature of the group adversely affected by the distinction, and (2) the nature of the interest adversely affected by the distinction. Where the group identified by the distinction is socially vulnerable and delineated by characteristics which are popularly conceived of as fundamental to personhood, the distinction is more likely to be considered discriminatory.[36]

It is clear now that in cases of discrimination, a claimant must follow a two-step process. First, the claimant should show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must demonstrate that the denial encompasses "discrimination." It is at this stage:

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[34] In a 1995 case, Madam Justice L'Heureux-Dubé, provided the following definition: for an individual to make out a violation of their rights under section 15(1) of the Charter, he or she must demonstrate the following three things:
(1) that there is a legislative distinction; (2) that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group;(3) that this distinction is "discriminatory" within the meaning of section 15. [The third stage of this analysis can be elaborated]: distinction is discriminatory ...where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concerns, respect, and consideration. This examination should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully appraised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.(Eagan v. Canada (1995] 2 S.C.R. 513).

[35] Adler v. Ontario [1997] *supra*, note 21.

[36] According to Madam Justice Wilson, in the process for determining whether there has been discrimination on grounds relating to personal characteristics or the individual or group, it is crucial:. . . to look not only at the impugned legislation which has created a distinction that violates the right of equality but also the larger social, political and legal context . . . it is only examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would identical treatment which would in the particular context result in inequality or foster disadvantage.(R. v. Turpin [1989] 1 S.C.R. 1296.)

> [In] order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the Charter.[37]

The Supreme Court of Canada has been providing a liberal rather than a literal interpretation to the definition of "discrimination." The most recent example[38] is the 1998 case of *Vriend v. Alberta*,[39] wherein the Court added "sexual orientation," by using the unusual remedy of reading in the phrase in a statute to the analogous (non-enumerated) grounds on which discrimination is prohibited. Similarly, in the 1997 case of *Eaton v. Brant County Board of Education*,[40] dealing with students in need of special education, the Court laid down that the purpose of section 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.[41]

Hate Propaganda by Teachers

Section 2(b) of the Canadian Charter provides for "freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication."[42] This section has become relevant in teachers' oral and written expressions both on and off campus that may be defined as hate propaganda.[43] The Supreme Court of Canada, while heaping praise on the freedom of expression, has come down strongly against teachers who spread hate propaganda, both inside or outside of the schools where they teach.[44] In the first case, where a teacher was poisoning the school environment within the school by his anti-Jewish views, the Court, in upholding disciplinary action against the teacher, said that "hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged."[45] In a more recent dispute,[46] the Supreme Court upheld the recommendation of a board of enquiry, set up under the provincial human rights legislation to investigate a teacher, to either dismiss or relocate the teacher because he was propagating his anti-Jewish and racist views outside of the school where he worked. The Court, relying on American precedents, determined that the conduct of teachers is evaluated on the basis of their position, rather than where it takes place: "Teachers are seen by the community to be the medium for the educational message and because the community position they occupy . . . teachers do not necessarily check their teaching hats at the school-yard gate and may be perceived to be wearing their teaching hats even off duty."[47]

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[37] Madam Justice McLachlin, in Miron v. Trundel [1995] 2 S.C.R. 418.

[38] *See* A.N. Khan, Canadian education: Discrimination based on or because of sexual orientation" (1998) 10(4) Education and the Law 253-264.

[39] [1998] 1 S.C.R. 493.

[40] [1997] 1 S.C.R. 241.

[41] For analysis of equality of educational opportunity, and how employing human rights concepts can help render an education system more inclusive, *see* A. Wayne MacKay, "Human Rights and Education: Problems and Prospects" (1996) 8(1) Education and Law Journal 70-88.

[42] This freedom has been used in some strange cases. For example, tobacco companies asked the courts to over-rule the federal legislation which prohibits the advertising of tobacco and tobacco products. The trial court held the provision unconstitutional because there was no proof of a cause-and-effect relationship between a ban on advertising and a reduction in smoking. However, the Québec Court of Appeal reversed the trial court's ruling. The Supreme Court of Canada upheld the ban, deciding that it was a reasonable limitation on freedom of expression: RJR- MacDonald v. Attorney General of Canada [1995] 3 S.C.R. 199.

Other Rights

Other provisions of the Charter that may be relevant to education are as follows. Section 25 is concerned with aboriginal rights and lays down that the Charter guarantees are "not to be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal people." Section 28 clarifies that of all the Charter rights and freedoms are "guaranteed equally to male and female persons."

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[43] *See* Supreme Court Justice La Forest's extra-judicial views in his article, 'Off-Duty Conduct and the Fiduciary Obligations of Teachers" (1997) 8(2) Education and Law Journal 119-137.

[44] Some rights, like those of hate-propagandists or pornographers, inevitably collide with the rights of others, for example equality rights of women, or minorities or teachers. The courts, on the one hand have to consider the rights of the former, and on the other have to weigh the arguments for justifying protecting the rights of the latter, so that some reasonable limits on the rights of the former are imposed. Fortunately, the Supreme Court of Canada has tilted towards giving protection to the latter rights, because "[t]he advancement of the value of equality does constitute a far more important objective than the protection of conventional morality": P. Hogg, Constitutional Law in Canada.

[45] R. v. Keegstra [1990] S.C.R. 697.

[46] Attis v. Moncton Board of School Trustees, Dist. No. 15 [1996] 1 S.C.R. 825. *See* P. T. Clarke, "Canadian Public School Teachers and Free Speech: Part 1 - An Introduction" (1998) 8(3) Educational & Law Journal296-314; A.N. Khan, "Hate Propaganda in Canadian Education (1996) 26(3) Journal of Law & Education 49-62.

[47] The Supreme Court of Canada, in R. v. Butler [1992]1 S.C.R. 452, upheld the constitutionality of obscenity provisions of the Criminal Code, saying that it was a reasonable limitation on one's freedom of expression. Pornography can be harmful to society, particularly to women and children. A balance, therefore, has to be struck between freedom of expression and protecting the public.

Sections 7-14 provide for the legal rights of accused persons, including unreasonable searches.

The 1998 Case on Equality

Canadian judicial and legislative lawmakers have been trying, on a step-by-step basis, to deal with the many discriminatory laws that the gay community faces. One of the important issues of general application has been decided in an educational setting: discrimination on the basis of sexual orientation be prohibited, in the same way as discrimination based on sex, race and ethnicity is prohibited.[48]

Some provinces such as Alberta, have refused to include "sexual orientation" as a prohibited ground in their human rights legislation. However, because all human rights enactments are subject to the Canadian Charter of Rights and Freedoms, the courts can declare whether any provision of such an enactment contravenes any provision of the Charter.

Provincial Courts of Appeal in Ontario and Alberta came to opposite conclusions on this point. The Ontario court in *Haig v. Canada*,[49] decided that "sexual orientation" should be a prohibited ground of discrimination. The court based its finding of discrimination on both the failure to provide an avenue of redress for prejudicial treatment of homosexual members of society and the possible inference from the omission of the ground of sexual orientation that such treatment is acceptable.[50] But, by a majority of two-to-one, the Alberta Court of Appeal in a different case rejected this result. Thus, the Supreme Court of Canada was provided with an opportunity to decide in 1998 whether a college teacher who was dismissed for his homosexuality could succeed in his claim that the Alberta human rights statute, which did not include "sexual orientation" as a prohibited ground, contravened the Equality Clause in section 15 of the Charter.

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[48] The federal government has been moving to remove discriminatory policies against same-sex couples in a number of laws. The two most recent proposals are: (1) gays and lesbians would be able to sponsor their partners into the country; and (2) spousal benefits will be extended to same-sex partners of federal employees: *See The Globe and Mail*, March 16,1999; *The Globe and Mail*, March 30, 1999.

[49] (1995) 9 O.R. (3d) 323 (Court of Appeal).

[50] The U. S. Supreme Court's opinion on exclusion is relevant here: [it] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavours that constitute ordinary civic life in a free society. Romer v. Evans 116 S. Ct. 1620 (1996).

The Supreme Court of Canada overruled the majority of the Alberta Court of Appeal and favored the decision of the Ontario Court of Appeal.[51] The Supreme Court held that sexual orientation is an analogous ground if excluded from human rights legislation. Justice Cory's opinion, the under-inclusiveness distinction, was made in two ways. First, it distinguished between homosexuals and other disadvantaged, but protected, groups; second, it distinguished between homosexuals and heterosexuals, denying substantive equality to homosexuals.

The Supreme Court confirmed the following statement in its 1997 education case *Eaton v. Brant County Board of Education:*[52]

> The principal object of certain of the prohibited grounds is the elimination of discrimination by attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race and sex....The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.

The Court, giving wide and literal interpretation to the remedies provision of the Canadian Charter (to give "such remedy as the court considers appropriate and just in the circumstances" section 24), read in sexual orientation in the Alberta legislation. The Supreme Court, disagreeing with Justice McClung's opinion in the Alberta Court of Appeal that the remedy of "reading in" would never be appropriate and that instead the statute should be returned to the sponsoring legislature for appropriate changes,[53] opined that:

> Charter scrutiny will always involve some interference with the legislative will. Where a statute has been found to be unconstitutional, whether the court chooses to read provision

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[51] Vriend, *supra.*The reasoning of Madam Justice Russell in the Alberta Court of Queen's Bench, [1994] 152 ALR 1, and the dissenting judgment of Justice of Appeal Hunt in the Alberta Court of Appeal, (1996) ALR 16, was accepted by the Supreme Court.

[52] *Supra*, note 40.

[53] Justice McClung was against judicial activism or judicial legislation, because it: ignores our adopted British parliamentary safeguards, historic in themselves, and which are the practical bulkheads that protect representative government. When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved.

> into the legislation or strike it down, legislative intent is necessarily interfered with to some extent.

This author submits that, despite reluctance by some judges to accept the fact, the 1982 changes, borrowing from the American model, modified the principle of parliamentary supremacy, so that the courts are now given constitutionally-blessed remedial role in overriding parliamentary will, which may be in contradiction of the Constitution. Thus, the legislative and executive arms of the government have to perform their roles in compliance with the constitutionally-entrenched rights and freedoms. According to the Supreme Court, the courts are the trustees of these rights insofar as disputes arise concerning their interpretation. However, the court noted that declaring legislative will unconstitutional "should not be done needlessly, but only after considered examination."[54]

Search and Seizure in Schools

In a case decided by the Supreme Court of Canada in 1998 (*R. v. M.(M.R.)*,[55] the Canadian Charter's provision in section 8 dealing with everyone's right "to be secure against unreasonable search and seizure"[56] was at issue in the context of an educational establishment.

Facts and Lower Courts' Decisions

A school vice-principal was informed by some reliable pupils that the accused, a thirteen-year-old junior high school student, intended to sell drugs at a school function on school property. The vice-principal asked the accused and his companion to come to his office where he asked each of the students if they were in possession of drugs, and, getting no satisfactory answer, advised them that he was going to search them. Prior to this, the vice-principal had called a plain-clothed police officer to the premises in accordance with school policy. The police officer remained present during the search but did not say or do any thing. When the vice-principal discovered a quantity of marijuana on the body of the accused, he turned it over to the police officer. The officer, after arresting the student for possession of a narcotic, read him the police caution and informed him of his right to counsel and the right to contact a parent or an adult.

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[54] Madam Justice L'Heureux-Dube´ in Vriend, *supra*.

[55] (1999) 166 D.L.R. (4th) 261.

[56] This section has resulted in many court cases. For example, *see* the three most recent Supreme Court cases: R. v. Arp (1999) D.L.R. (4th) 296; Schreiber v. Canada (Attorney-General) [1998] 1 S.C.R. 841; R. v. Caslake [1998] 1 S.C.R. 51.

At trial, the judge excluded the evidence that was discovered in the search and the Prosecution did not offer any other evidence. As such, the charge against the student was dismissed. The trial judge struck the search down on the ground that it violated the student's rights under section 8 of the Charter because insofar as the vice-principal was acting as an agent of the police, proper procedural safeguards were missing. The Court of Appeal allowed[57] the Prosecution's appeal and ordered a new trial.[58] The Supreme Court of Canada finally had to decide the issue of when, and in what circumstances, a search by a school official should be considered unreasonable and in violation of a student's right to be secure against unreasonable searches and seizures.

The Supreme Court Says Schools Come Under Different Standards

The full Court of nine Justices heard and decided the final appeal. Eight held that the vice-principal was not acting as an agent of the police and that the mere presence of the police officer was insufficient to conclude that the officer was, in fact, the authority carrying out the search, as he was, at all times, completely passive.

The Court maintained that a student's reasonable expectation of privacy in the school environment is significantly diminished. The existing law is that while a search requires prior authorization, usually in the form of a warrant, from a neutral arbiter, it may not be reasonable in every instance to insist on prior authorization. A school search, the Court concluded, is just such a situation because requiring a warrant or any other prior authorization in a school search or seizure is clearly impractical and unworkable. The Court was of the opinion that teachers and administrators must be able to respond quickly and effectively to problems that arise in their school. Therefore, in the case of a school search or seizure, the court was not convinced that a warrant was required. In reaching its judgment, the Court considered the increasing presence of illicit drugs and dangerous weapons in schools which challenge the ability of teachers and administrators to fulfil their responsibility to maintain a safe and orderly environment. The Court added:

> Ordinarily, school authorities will be in the best position to evaluate the information they receive. As a result of their

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[57] (1997) 159 N.S.R. (2d) 321.

[58] For commentaries, *see* A.W. MacKay, "Don't Mind Me, I am from the R.C.M.P. [Royal Canadian Mounted Police]: R. v. M. (M.R)- Another Brick in the Wall Between Students and Their Rights" (1997) 7 C.R. (5th) 24; C.M. Dickinson, "Searching for Reason" (1998) 8(3) Education and Law Journal 441.

> training, background and experience, they will be in the best possible position to assess both the propensity and credibility of their students and to relate the information they receive to the situation existing in their particular school. For these reasons, courts should recognize the preferred position of school authorities to determine whether reasonable grounds existed for the search.

The ninth member of the Court, Justice Major, while agreeing with many conclusions of the majority, especially that a student's expectation of privacy while on school property is lower than a member of the general public, dissented on the point of whether the vice-principal was an agent of the police. He agreed with the trial judge's finding that since the vice-principal was an agent of the police, the applicable criterion should be that of the police-searches, where more strict safeguards prevail.

Canadian courts have followed and applied the United States Supreme Court's reasoning in the leading decision, under the Fourth Amendment's prohibition of unreasonable searches and seizures. In *New Jersey v. T.L.O.*,[59] the Court said that against the interests of the student's privacy must be set substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. The Court decided that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject, some modification of the level of suspicion of illicit activity needed to justify a search, and a modification to the principle of warrant requirement.

The Standard of "Reasonableness"

To be reasonable, according to the Supreme Court of Canada, a school search by school authorities must be conducted reasonably and must be authorized by a direct or indirect statutory provision that is itself reasonable, such as the Schools Act or the Education Act. Further, a school search may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated and that evidence of the violation will be found in the location or on the person of the student searched. In determining whether a search is reasonable, all the circumstances surrounding it, including the age and gender of the student and the possibility of finding drugs or weapons, have to be taken into consideration. Ultimately, the reasonableness of a search by teachers or principals in response to information received must be reviewed and considered in the context of all the circumstances presented including their responsibility for students' safety.

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[59] 105 S. Ct. 733 (1985), 469 U.S. 325 [21 Educ. L. Rep. 1122] (1985).

Thus, the Canadian legal position so far as it relates to whether a school search is reasonable was summarized by the Court as:

> 1. The first step is to determine whether it can be inferred from the provisions of the relevant Education Act that teachers and principals are authorized to conduct searches of their students in appropriate circumstances. In the school environment such a statutory authorization would be reasonable.
> 2. The search itself must be carried out in a reasonable manner. It should be conducted in a sensitive manner and be minimally intrusive.
> 3. In order to determine whether a search was reasonable, all the surrounding circumstances will have to be considered.

Conclusion

The Canadian Charter of Rights and Freedoms is playing a significant role in the societal changes occurring in Canada. Education has not been immune from the Charter's impact. Insofar as the United States Bill of Rights may be considered to be the precursor of the Canadian Charter, American precedents have become relevant in Canada. Like the American Bill of Rights, the Canadian Charter has constitutionalized the Canadian law of education. During the last two decades, many developments have taken place under the Charter. With passage of time, greater influence of the Charter is likely to be felt on many educational polices and practices. The year 1998 has not been an exception. The pace of judicial developments has accelerated during the last few years and the trend is likely to continue and have contributed to the evolution of and changes in the Canadian society. As Ratna Gosh points out:

> Social change, whether gradual or evolutionary, is inevitable and brings with it new patterns of social interaction. The place of education in this process is both complex and critical. In today's postmodern, postindustrial society, the Canadian social profile is changing radically and rapidly. Education has a significant role to play in this change, especially because of the pressing changes in the nature of the family and work, and the needs of a technological society in an information age.[60]

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[60] R. Gosh in R. Gosh & D. Ray, Social Change and Education in Canada.

ENGLAND AND WALES

Neville Harris

Introduction

The pace of legal development in the field of education law in the United Kingdom and the involvement of lawyers in educational dispute resolution continue to grow. In May 1997, the nation elected a Labour government which promised to put education "at the heart of government" and to make it the "number one priority."[1] Insofar as wholesale reform demands legislation, there has already been one major Act as well as another shorter one affecting education in England and Wales.[2] Reform in Northern Ireland has to some extent paralleled that in England and Wales but may become more distinctive if the new assembly, which will have legislative authority over education, comes to fruition (under the Northern Ireland Act 1998). This chapter focuses on legislation, public law challenges to education decisions and administrative actions, and also illustrates the kind of case law, including some interesting private law cases on educational malpractice, that is developing in England and Wales.[3] First, the chapter contextualizes the reforms by examining the structure of education as it has evolved since the landmark Education Act 1944.

The Present Education Structure

The structure of education originates in the 1944 Act, although the past two decades have seen enormous changes to the schools system, including the subjection of the whole system to market forces, consumerism, and intense regulation. The schools system was intended in 1944 to be, and remains, a "national service, locally administered."[4] National policy has, however, come increasingly to prominence and is implemented via primary legislation (statutes) and secondary legislation (in the form of statutory instruments, regulations, and orders, made by ministers of state). While central control has increased greatly, education is still administered by local education authorities (LEAs), under the Education Act of 1996, a statute which consolidated previous legislation.

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[1] Secretary of State for Education and Employment, Excellence in Schools, Cm 3681 (London: The Stationery Office, 1997), p.11.

[2] The shorter was the Education (Schools) Act 1997. It makes provision for the phasing out of a scheme ("assisted places") enabling central government grant to be made to cover the fees and other expenses incurred by a limited number of parents from poorer backgrounds in sending their academically able children to private selective schools.

[3] The first series of Education Law Reports was launched in 1994. E.L.R. is now published in six issues per year by Jordan Publishing, 21 St. Thomas Street, Bristol, BS1 6JS.

[4] *See* N. Harris, Law and Education: Regulation, Consumerism and the Education System (London: Sweet and Maxwell, 1993), Chapter 2.

LEAs correspond to each of the local government authority areas, of which there are around 150. LEAs have a general duty to ensure that there are sufficient schools in their area.[5] LEAs receive local revenue and central government funds for education, but expenditure limits are set annually by central government as part of the standard spending assessments for local authorities. Most state schools, numbering 25,000 in England and Wales, are maintained by their LEAs. Even so, each LEA has a duty to devolve a school's budget share, determined under a local formula, to the individual schools. With this devolution of financial control to a school's governing body goes a considerable degree of autonomy over the appointment of staff. A minority of state schools lie outside the LEA sphere and receive funding directly from a separate central government agency, the Funding Agency for Schools (FAS). These are "grant-maintained" (GM) schools. GM schools are now being absorbed back into the LEA sector under the School Standards and Framework Act 1998 and the FAS will be abolished. Since 1992, LEAs have had only a residual responsibility for further education in their area, with most colleges run by individual "further education corporations" funded by the Further Education Funding Council, and they have no responsibility for higher (university) education.

Public sector schooling in England and Wales is provided in primary (generally ages 5-11) and secondary (ages 11-18) schools, although a small number of LEAs operate "middle schools" covering ages 8-13. There are also "special" schools for pupils with learning difficulties. The private sector runs some special schools in addition to mainstream independent schools. In the public sector, primary and secondary schools are divided into different categories which reflect their denominational or non-denominational status. The overall control of a school rests with its governing body,[6] comprising elected parent and teacher representatives, LEA-appointed governors, co-opted governors from the local business community or professions and, in the case of many denominational schools, foundation governors representing the relevant religious body. The head teacher is also usually a governor, but is barred from chairing the board of governors. The head teacher is responsible for the general day-to-day management of the school and has specific responsibilities concerning, for example, the curriculum and discipline among pupils.[7] One of the key areas of responsibilityof the head teacher is to ensure that students with special educational needs are identified as such and, where appropriate, are referred to the LEA for specialist assessment and provision.[8]

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[5] Education Act 1996, s14.

[6] Ibid, s130.

Special educational needs continues to be an area in which the notion of partnership between parents and education agencies has been increasingly promoted but where conflict is particularly prevalent. Since 1994, parents have been able to have decisions about their child's special education re-considered by a Special Educational Needs Tribunal (SENT) and have been utilizing this mechanism in increasing numbers.[9]

Redress mechanisms like the SENT have become increasingly important. The SENT, which deals with over 2,000 appeals per year, is different from most adjudicative bodies in education in that it is nationally-operated and all of its panels are chaired by lawyers. The other two main appeal mechanisms in the educational system, concerning school admissions and permanent exclusions from school, are locally administered. School admission appeals have increased from 18,000 in 1990 to 72,000 in 1997 and exclusion appeals are up from 92 to 1,400 over the same period.[10] The courts also play an important role. Most of the education cases which reach the courts are applications for judicial review of a decision by a school, LEA, or the Secretary of State.[11] Judicial review of cases occurs in the High Court and is founded on public law principles: the court is concerned with the legality of the decision (such as whether the LEA misapplied the law or acted outside its statutorily defined remit or whether there was a breach of natural justice in the decision-making process) rather than its merits. This means that the outcome of a successful application for judicial review will be the setting-aside of the administrative decision or an order requiring a duty to be performed, but generally not an award of damages. Damages are normally the objective of ordinary tort or contract litigation, which has been the subject of some especially important cases in 1997 and 1998.

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[7] *See*, for example, School Standards and Framework Act 1998, s64.

[8] Education Act 1996, Part IV.

[9] *See* N. Harris, Special Educational Needs and Access to Justice (Jordans, Bristol UK, 1997).

[10] Drawn from Council on Tribunals Annual Reports and Department for Education and Employment statistics.

[11] *See* N. Harris "Judicial Review and Education" in T. Buck (ed.), Judicial Review and Social Welfare (London: Pinter, 1998) 1-38.

Responsibility for monitoring and advising on school standards rests with the Chief Inspector of Schools. The Chief Inspector heads the Office for Standards in Education. It is expected that professional standards for teachers will be devised and monitored by the new General Teaching Council being established under the Teaching and Higher Education Act 1998.[12] Standards achieved by universities and colleges are monitored through qualitative assessment of teaching and research by the relevant central funding authorities such as the Further Education Funding Council for colleges and the Higher Education Funding Council for universities.

"Standards Matter More Than Structures"

Recent legal developments must be placed within the current policy context, in particular the Government's preoccupation with improving schools and raising achievement among students.

The annual report of the Chief Inspector of Schools on school standards indicates the shape that the education system is in, based on the evidence derived from over 7,000 school inspections in the preceding year.[13] The latest report, covering the 1997-1998 school year, shows that standards of teaching are improving. In many ways, the report focuses on extremes of performance by teachers and schools. For example, it notes that despite an overall improvement to the quality of teaching, 3% of mainstream schools and 8% of special schools failed their inspections. Moreover, 40% of children leaving primary school (at age eleven) did not reach the expected standard in English and mathematics and there was a similar picture of under-achievement among children aged fourteen. Around 350 schools have been classed as failing, in the sense of not providing an acceptable standard of education, since the new regulatory regime for school inspection was introduced in 1993. However, to date; 200 of these schools have been turned around and are no longer threatened with closure by the Secretary of State.

The Chief Inspector's report covers the year before the implementation of the School Standards and Framework Act 1998 (the 1998 Act), the first major piece of education legislation enacted under a Labour Government since the Second World War. During the eighteen years that Labour was out of power, the Conservatives transformed the education system through a series of legislative programs.[14] The Labour

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[12] *See* Department for Education and Employment, Teaching: High Status, High Standards (London: DfEE, 1998).

[13] Each school, including a private or "independent" school, will be inspected approximately once every five to six year, under the School Inspections Act 1996.

[14] *See* Harris (1993), *supra*, note 4.

Government argues that the reforms concentrated too much on the structure of the education system and it claims that "standards matter more than structures."[15] In fact, the 1998 Act implicitly endorsed many of the Conservatives' structural reforms such as the school inspections regime and the National Curriculum framework that resulted from the Education Reform Act 1988. The 1998 Act is also significant for the way it seeks to impose strict responsibility for quality in education throughout all stages of education and involving all agencies. This means, *inter alia*, that there is some reversal of the declining pivotal role of LEAs in the education system. Despite this, the Act represents a continuity in the centralising trend of education legislation over the past decade and a half. The Labour Government has not ceded any central power but is seeking to give LEAs a more prominent role in monitoring standards of education and in providing support services to schools.

The Government's preoccupation both with standards of education and the need to secure improvements in schooling is reflected in its national targets for raised standards of literacy and numeracy among school students. Current goals are that 80% of eleven year olds reach the literacy standard expected for their age in English and that 75% of this age group reach the equivalent level in mathematics by 2002.[16] The Government has promoted various regulatory measures in order to ensure that schools and LEAs work effectively towards ensuring that the targets are met. Following on from the powers laid down in an earlier Act and in regulations to set targets for the performance of students in various examinations and other forms of assessment,[17] the 1998 Act extends target setting throughout the education system. This Act includes school targets for reduced truancy, part of the Government's parallel policy initiative to reduce social exclusion.[18] Moreover, LEAs now have a general duty to exercise their functions with a view to promoting high standards and a specific duty to prepare education development plans showing how they will raise standards and improve the performance of schools.[19] The duties of LEAs are reinforced by new powers of intervention in a school, which apply where the standard of students' performance is unacceptably low or where there has been a "serious breakdown in the way the school is managed or governed that is prejudicing, or likely to prejudice, such standards of performance."[20]

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[15] *Note* 1, p.12.

[16] Ibid, p.19.

[17] Education Act 1997, ss 19 and 20; and the Education (School Performance Targets) (England) Regulations 1998 (SI 1998 No1532).

[18] 1998 Act, s63; Social Exclusion Unit, Truancy and School Exclusion, Cm 3957 (London: Stationery Office, 1998).

[19] 1998 Act, ss 5, 6 and 7.

[20] Ibid, ss 14 and 15.

New guidance is to be issued on the relationships between schools and LEAs in such matters as "promoting high standards of education."[21] This guidance is likely to reinforce the message presented in the Government's general schools policy document that LEAs' role is "no longer focused on control, but on supporting self-determining schools. LEAs must earn their place in the new partnership."[22] Schools, on the other hand, "are responsible for their own standards. They should continuously and actively seek to improve their performance so that every child can succeed."[23] Teachers will certainly have to play their part. There are plans, not yet implemented, to link the career progression of teachers to performance.[24] The Chief Inspector has expressed concern that some 15,000 teachers in England and Wales are incompetent and the Government has threatened those who do not improve with dismissal.

The use of such a relativistic concept as high standards in relation to any statutory requirements is likely to limit the enforceability of the duties. The courts have traditionally viewed such duties as target duties rather than absolutes, so that it is almost impossible for an ordinary citizen to secure redress where the duty is not (fully) performed: "The metaphor recognizes that the statute requires the relevant public authority to aim to make the prescribed provision but does not regard failure to achieve it without more as a breach."[25] Nevertheless, complaints could be made to the Secretary of State, who has a range of default powers (originating from the 1944 Act) enabling intervention where the LEA or governing body of a school fails in any of its duties. These powers have been strengthened under the 1998 Act.[26]

The School Standards and Framework Act 1998 and Educational Provision

The changes made by the 1998 Act to the role of LEAs has already been noted. The Act has also made a change to the requirements on membership of the local Education Committee. This Committee is the main policy-making body of each LEA, although since 1993 LEAs are no longer required to have one policy and can instead be made by a joint committee of the local government authority, covering education and other local services. The 1998 Act empowers the Secretary of State to lay down regulations requiring the Education Committee, or any of its sub-committees, to have elected representatives of parents within the membership, although they will not be able to vote on budgetary decisions.[27] This change is designed to improve local accountability and decision-making.

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[21] Ibid, s127.

[22] Note 1, *supra* p.69.

[23] Ibid, p 66.

[24] Department for Education and Employment, Teachers: Meeting the Challenge of Change (London: DfEE, 1998).

[25] R. v. London Borough of Islington *ex parte* Rixon [1997] E.L.R. 66 at 69D; *see also* R. v. Inner London Education Authority *ex parte* Ali [1990] Admin. L.R 822.

[26] Education Act 1996, ss 496, 497, 497A and 497B (the last two added via s8 of the 1998 Act).

One of the most problematic aspects of local education administration concerns the organisation of school places. As noted above, LEAs are required to ensure that there are sufficient schools in their areas. In considering this question, LEAs must ensure that there are equal opportunities for children irrespective of race and gender.[28] However, due to the general principle of parental choice of school, planning of provision can be difficult, not the least because the right of parents to select a school place outside their area of residence[29] means that some parents will not need a school place in their own LEA's area. To help with these planning difficulties, the 1998 Act provides for the establishment of a school organisation committee (SOC) in each area.[30] The LEA and representatives of the Church of England and Roman Catholic diocese are to be represented on the SOC. One of the main functions of the SOC is to consider and comment upon the local school organisation plan drawn up under a new statutory duty by the LEA.[31] The plan cannot be implemented unless it has been approved by the SOC or, if the SOC is not unanimous about the plan, by an adjudicator.[32] The office of adjudicator is novel in the field of education law in the United Kingdom. Adjudicators will be appointed by the Secretary of State: the process is underway at the time of writing, and there are expected to be twenty of them initially. Legal qualifications are not a statutory requirement for appointment as an adjudicator. Adjudicators may also be involved in determining plans for any closures or reorganisation of local schools if the SOC cannot agree.[33]

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[27] 1998 Act, s9

[28] Sex Discrimination Act 1975; Race Relations Act 1976; Equal Opportunities Commission v. Birmingham City Council [1989] 1 All ER. 617; and R v. Birmingham City Council *ex parte* The Equal Opportunities Commission (No.2) [1994] EL.R. 282.

[29] 1996 Act, s411(5)(a); R. v. Greenwich London Borough Council *ex parte* Governors of John Ball Primary School (1990) L.G.R. 589.

[30] 1998 Act, s24 and Sched.4.

[31] Ibid, s26.

[32] Ibid, s25 and Schedule 5.

[33] Ibid, Schedule 6.

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Corresponding changes are also being made to the law governing school admission arrangements that will have to be considered and commented upon by interested parties.[34] Any party who wishes to object to the proposed arrangements may refer the matter for determination by an adjudicator who must, in some cases, refer the matter to the Secretary of State.[35] The basic legal framework under which parents may select a school for their child has not been altered, although some changes have been made to the statutory appeal arrangements for parents who disagree with the school place allocated by the admissions authority.[36] Also, a new limit on class sizes for five, six, and seven year olds, set at thirty under the 1998 Act, is being phased in.[37] It is part of the drive to raise standards, in this case by ensuring that children receive more individual attention; but it will inevitably limit parental choice to some extent.[38] Around one third of children of these ages are currently taught in classes of more than thirty students, so this reform could have serious administrative and resource implications.

The subject of school admissions remains highly contentious, not least because up to one in five parents fail to secure a place at the school of their choice.[39] Access to schools was broadened by the abolition of selection of students by ability in most LEA areas during the 1960s and 1970s. Today, only 163 of the 25,000 state-maintained schools in England and Wales select students on the basis of academic ability. In the past, a Labour Government would, on ideological grounds, have removed the legal sanction to selection by ability. "New" Labour, however, is tolerant of it where it currently exists, but has made provision in the 1998 Act enabling parents to vote in a local ballot on whether a particular school, or a number of local schools, should retain selective status.[40] The Act also makes it clear that two other forms of selection are permitted: selection designed to ensure that students admitted are proportionately representative of all ability levels and selection under arrangements that permit aptitude for particular subjects to be a factor in up to 10% of the places allocated at a particular school.[41]

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[34] Ibid, s89 and the Education (Determination of Admissions Arrangements) Regulations 1999.

[35] 1998 Act, s90.

[36] *See* N. Harris, "The developing role of the education appeal system", in M. Partington and M. Harris (eds) *Administrative Justice in the Twenty-First Century* (Oxford: Hart, 1999 - in press).

[37] 1998 Act, ss 1-3.

[38] Ibid, s86(4).

[39] Audit Commission, Trading Places (London: Audit Commission, 1996)

[40] 1998 Act, ss 100 and 105-109.

[41] Ibid, ss 101-103.

Ideology is certainly not absent in New Labour's thinking, however. This is particularly true of the links the Government has made between the whole issue of raising levels of achievement among schoolchildren and the need to tackle social exclusion. In this regard, the Government wants to give schools a broader role in particularly deprived local communities. The policy it has adopted involves the establishment of twenty-five "education action zones" (EAZs) initially under powers contained in the 1998 Act.[42] EAZs will comprise two or more schools in areas of under-achievement among children where traditional patterns of educational provision may not fully meet those children's needs. EAZs will attract higher levels of funding, three-quarters of which will be public money; the other quarter will be sponsorship from the private sector. EAZs will be freed from the precise requirements of the National Curriculum, enabling them to provide a more flexible and less academic curriculum, aimed at reducing student alienation and enabling greater attention to be focused on basic skills. Extracurricular activities, such as homework (schoolwork) clubs, will also be supported. Teachers will be employed under special, more flexible, contracts and pay levels will be adjusted to take account of the longer or more unsociable hours they may need to work.[43] The EAZ strategy represents something of an experiment. The Government has indicated that if it succeeds, a national network of EAZs will be established.

Other changes made by the 1998 Act to local educational provision include the reclassification of schools, mostly involving a cosmetic change of nomenclature, for example, county schools become community schools, but also creating a new category to facilitate the partial absorption of GM schools into the LEA sector where most will become foundation schools.[44] At the same time, changes are being made to the composition of governing bodies of schools. The changes include increased parental representation.[45] Under changes to be made to the legal basis for funding schools, LEAs will have to delegate even more of their education budget to schools.[46]

The Labour Government has also given attention to a previously neglected area of education policy: nursery education. The Government rightly acknowledges the importance of good nursery education for students to achieve success at primary school and beyond.[47] The 1998 Act has placed LEAs under a new duty to ensure that there is sufficient nursery education provision available in their area.[48] Initially, this requirement will apply only to four-year-olds. Each LEA will have to establish an early years development partnership to monitor the sufficiency of provision and to prepare an early years development plan.[49] The quality of nursery education will be assessed through new inspection arrangements.[50]

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[42] Ibid, ss 10-12.

[43] Ibid, s13.

[44] Ibid, ss 20 and 21 and Schedule 2.

[45] Ibid, s36 and Schedule 9.

[46] 1998 Act, ss 45-50 and regulations still to be made.

[47] Note 1, Chapter 2.

Finally, there are reforms in the area of school discipline that are of particular interest. First, the Act, in effect, extends the ban on the infliction of corporal punishment by school staff on students previously applicable since 1987 to children in publicly funded education to those whose education is privately funded.[51] Although not all corporal punishment constitutes inhuman or degrading treatment or torture under the European Convention on Human Rights,[52] its use has increasingly been called into question and the fact that only private schools could inflict it was anomalous. The effect of the new law is that, in the context of school discipline, no teachers shall be able to rely on the common law defence of lawful chastisement of a child in any civil proceedings brought against them by a parent or child.

Second, the Act changes the legal framework to the exclusion of students from school. The Government's aim here is to reduce the frequency with which the power of permanent exclusion from school, which rests with the head teacher alone, is exercised. Experiencing school exclusion is associated with criminality and unemployment in later life.[53] Permanent exclusions in England rose from 2,900 in 1990-1991 to 12,700 in 1996-1997, according to Government figures. This increase has been attributed to a number of factors. One is the increased external pressure on schools to succeed which has the effect that students who are perceived as troublemakers are more readily excluded. Another factor is the limit to the power to exclude for a fixed period[54] and the abolition of the power of indefinite non-permanent exclusion in 1993-1994, which means that permanent exclusion is sometimes the only option available to the school. The main way in which the 1998 Act seeks to reduce exclusions is by laying down a statutory requirement that head teachers must have regard to new government guidance aimed at limiting exclusions.[55] The independence of the appeals process has also been strengthened.

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[48] 1998 Act, s118.

[49] Ibid, ss 119-121.

[50] Ibid, s 122 and Sched 26.

[51] Ibid, s.131.

[52] *See* Costello-Roberts v. United Kingdom [1994] E.L.R. 1.

[53] The report of the Government's Social Exclusion Unit, Truancy and School Exclusion, Cm 3957 (London: Stationery Office, 1998), refers to a number of research studies confirming this link.

[54] The Education Act 1997 extended the power of fixed term exclusion from 15 days per term (trimester) to 45 days in aggregate per year with no termly limit.

[55] 1998 Act, s68.

Two further disciplinary changes are of note. First, a head teacher will have a specific duty, when exercising the school's general disciplinary role, to take steps to deal with and prevent bullying by students,[56] which has become more widely recognised and is perceived to be a major problem. Second, a closer involvement of parents in the schooling process is sought particularly in the context of discipline. To foster a greater sense of partnership, the 1998 Act provides for "home-school agreements."[57] These agreements must specify a school's aims and values, its responsibilities concerning the education of children, the parent's responsibilities and the school's expectations of its students as regards their conduct. The aims of these agreements are ambitious:

> The detail will differ from school to school, but all agreements are likely to include expectations about the standard of education, the ethos of the school, regular and punctual attendance, discipline, homework, and the information schools and parents will give to one another. They will be important in helping engage parents in raising pupils' achievements and in action to combat truancy, bullying and unacceptable behaviour which undermines pupil's progress.[58]

Despite their ambitious aims, the agreement will, as the Government has explained, be a powerful statement of intent rather than the basis of a legally-binding transaction. Each governing body must adopt a home-school agreement for its school but each parent has the option of not signing it. Failure to sign an agreement cannot be a ground for refusing to admit a child to the school or excluding the child. Moreover, the Act makes it clear that the breach of a home-school agreement shall not create any liability arising under contract or tort. The strongest message conveyed by the introduction of home-school agreements is that they will be used to reinforce parental responsibility. It will be easier for a school to justify legally the exclusion of a child where the parent has previously signed an agreement to the effect that the child will behave appropriately. Indeed, a child may also have entered into such an obligation: the Act provides that a school may invite a child who has a sufficient understanding of the agreement to sign the agreement as an indication that the child acknowledges and accepts the school's expectations of its students.

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[56] Ibid, s61.

[57] Ibid, ss 110 and 111 Home-school agreements were previously required under the Education Act 1997, but the relevant provisions were not brought into force.

[58] Note 1, p.55.

Education in the Courts

In recent years the key areas of litigation have concerned special educational needs, educational malpractice, admission to school, exclusion and university education.

Special Educational Needs

Even with the introduction of the SENT, the greatest number of education cases reaching the English courts is in the field of special educational needs. Many of these cases are, in fact, appeals against decisions of the SENT and a majority are concerned with the performance of duties concerning the definition of a child's needs and the provision to meet them, including the school placement. Following a formal assessment, these are matters that will often need to be specified in a statement of special educational needs made under the Education Act 1996. Around 20% of children in England and Wales have special educational needs, defined primarily as arising from a learning difficulty,[59] and approximately one in seven of these students has a statement the equivalent of an American Individualized Education Program. Once a provision is specified in a statement, the LEA will be under a statutory duty to ensure that it is made.[60] This provision may include additional support, such as a certain number of hours per week of speech therapy. A series of cases has concerned the degree of specificity required in the statement.[61] In *L. v. Clarke and Somerset County Council*, [62] Laws, J., said that "[t]he real question . . . in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case."[63]

The question of placement and the naming of a school in a statement was in issue in three important appeals heard initially in the High Court (*White v. LB Ealing* and the SENT; *Richardson v. Solihull MBC and the SENT*; *Solihull MBC v. Finn and the SENT*;[64] two of which were heard subsequently in the Court of Appeal together with a third case (*Richardson v. Solihull MBC and the SENT; White and Another v .L.B. Ealing and the SENT; Hereford and Worcester County Council v. Lane.*[65] In *White* and *Richardson*, the parents wanted their children educated at the Higashi school catering for autistic children in Boston, Massachusetts. In *Finn*, the parents raised funds to help towards sending the child to the Higashi school at a cost of £50,000 per annum. The SENT named the Higashi school, for the purposes of the statement, as it could meet the child's needs whereas the LEA's (less expensive) preferred school would not. Dyson, J. held that there was no duty under the 1996 Act to name a particular school in a child's statement. There was no irrationality in the decisions taken in these cases. In *Finn*, the LEA had not made suitable arrangements. The LEA would have to provide the additional funds needed. When *Richardson* and *White* were heard in the Court of Appeal, it upheld the Dyson ruling. In relation to *Lane*, the court decided that the SENT erred in ignoring the annual cost to the LEA of funding the education of the child at the school preferred by the parents (£30,000) as compared with the alternative school preferred by the LEA (£10,000).[66]

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[59] *See* N Harris, *The Law Relating to Schools* (Croydon: Tolley, 1995), Chapter 9.

[60] 1996 Act, s324.

[61] R. v. Secretary of State for Educ. ex p E [1992] 1 F.L.R. (Family Law Reports) 377 and *Re* L [1994] E.L.R. 16.

[62] [1998] E.L.R. 129.

[63] *Id* at 137.

[64] [1998] E.L.R. 203).

[65] [1998] E.L.R. 319).

Placement and funding were also at issue in *G. v. Barnet London Borough Council*[67] where the father of a statemented five-year-old girl wanted the LEA to cover the fees for the girl to attend a private Jewish school. The father argued that the SENT's refusal to cover his daughter's fees failed to consider her background and culture and was erroneous in law. The court disagreed with this argument, finding that the child's orthodox background was not part of her special educational needs to be met under the statement. According to the court, the tribunal's duty was merely to take these factors into account and this it had done. In *G. v. Wakefield MBC*,[68] the court decided that while stressful domestic circumstances, which meant that respite care for the child would be very helpful, could be relevant in determining whether the child should have a residential school placement at the LEA's expense, normally respite care would not fall within the scope of the twin concepts of special educational needs and special educational provision.

These cases demonstrate that the present statutory scheme concerning special education, which dates from the Education Act 1993, continues to give rise to interpretational difficulties. The point is further illustrated by *Catchpole v. Buckinghamshire County Council and the Special Educational Needs Tribunal*.[69] The 1996 Act gives parents some choice over school placement, so that if a suitable preferred school can take the child, it should be named in the statement. Yet, this does not apply to an independent (private) schools, which the parents preferred. However, the general principle of adherence to parental wishes must still be applied: LEAs "shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."[70] Laws, J., nevertheless reminded us that this does not guarantee parental choice since at most it creates a bias in favour of parental choice where more than one school is under consideration and where everything else is equal.

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[66] *See also* Jules v. Wandsworth London Borough Council [1998] E.L.R. 243.

[67] [1998] E.L.R. 480.

[68] [1998] 29 January (unreported)

[69] [1998] E.L.R. 463).

Educational Malpractice

The field of educational malpractice litigation was opened up by a key decision of the House of Lords in 1995: *X v. Bedfordshire County Council*.[71] Until *X* no-one had been sure that the law of tort would recognise any rights beyond those arising from physical injuries sustained on the sports field, the school yard, the school bus, the science laboratory, and so on. The House rejected, mostly on policy grounds, claims for breach of statutory duty in connection with the education of children with special educational needs, especially where an authority would have a degree of discretion (for example, over the form of educational provision that would meet the child's needs). Even so, the court left open the possibility that an education authority could be liable for the conduct of its educational psychology service, particularly its role in advising parents on special educational needs matters. The House of Lords also ruled that a head teacher and advisory teacher owe a common law duty of care to students to take reasonable steps in response to a student's under-performance, for example by referring him/her for assessment by a specialist, and in the giving of advice to parents.

The *X* judgment was considered in *Phelps v. London Borough of Hillingdon*.[72] Phelps was born in 1973 and, at first, her poor progress at school was thought to be due to emotional factors and a consequence of her parents' behaviour. Eventually, in 1985, the school referred Phelps to an educational psychologist employed by the LEA who carried out an assessment and reported that she was still seriously underfunctioning in reading and spelling and needed to have her confidence built up. However, the psychologist failed to diagnose Phelps' dyslexia. Phelps' claim for damages was based on the failure to diagnose her dyslexia in 1985 and a lack of appropriate provision since her needs were not properly identified. Phelps sought damages for the cost of private remedial education after leaving school and for loss of earnings past and future, plus general damages for her anxiety, frustration, loss of self-confidence and loss of self-esteem. The High Court, Garland, J., found no liability on the part of the school, but held the LEA vicariously liable for the psychologist's negligent failure both to diagnose Phelps's dyslexia and to respond appropriately to her continuing under-performance. The court ruled that damages, assessed at £45,000, were recoverable on the basis that the adverse consequences of Phelps' dyslexia could have been mitigated by earlier diagnosis and appropriate treatment or educational provision.

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[70] 1996 Act, s9.

[71] [1995] E.L.R. 404.

[72] [1998] E.L.R. 38.

Even though another case decided in the same month, *Christmas v. Hampshire County Council*,[73] failed on its facts (C. had claimed negligence by his head teacher in failing to refer his needs for specialist outside assessment), the overall effect of *X*, in the light of *Phelps*, was seemingly to open the door to educational malpractice claims based on negligence at common law.[74] This view was reinforced in *Anderton v. Clwyd County Counci*l,[75] where the court had to determine whether pre-proceedings discovery should be ordered in respect of documents allegedly supporting a claim of negligence based on a failure to diagnose dyslexia. The court could make such an order if the claim was in respect of a personal injury. Steel, J., said that he was prepared to regard injury as including a failure to mitigate the adverse consequences of a congenital defect, and the order was approved. Later, however, this ruling was overturned by the Court of Appeal.[76]

The most important aspect of *Phelps* was how the court found that the role of the educational psychologist was not simply to advise the LEA and the school but also to tender advice to the child and her parents, giving rise to the necessary proximity in the relationship for the purposes of the existence of a duty of care. When *Phelps* was subsequently taken to the Court of Appeal,[77] it not only denied that dyslexia was an injury but also concluded that failure to mitigate its effects could not be an injury.[78] In addition, the court decided that the facts showed that the educational psychologist was part of the LEA's team of employees for carrying out the LEA's statutory services for children with special educational needs. As such, the court believed that the psychologist had a duty to the LEA, not personally to the child or her parents. The Court of Appeal was influenced by policy considerations, particularly the risk of "vexatious claims . . . against many teachers or educational psychologists many years after the relevant decisions were taken;"[79] the need to expend "scarce resources, both financial and human" in fighting such cases;[80] the fact that there were other ways, such as statutory appeal procedures, to challenge action or inaction by LEAs; and the risk of defensive education, the equivalent of defensive medicine, involving an over-cautious approach to education "to guard against the possible charge of negligence in not doing enough,"[81] which would be wasteful of resources. Further, the court was influenced by the restrictive approach of the judiciary in the United States towards educational malpractice liability.

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[73] [1998] E.LR 1.

[74] *See* J. Robinson, "Damages for a Pupil's Academic Under-performance in School - This far, but how much further?" (1998) xx(1) Liverpool Law Review 95-114.

[75] [1998] E.L.R 533.

[76] [1999] E.L.R. 1.

[77] [1998] E.L.R. 587.

[78] *See also* Anderton v. Clwyd County Council [1999] E.L.R. 1, op. cit.

Providing special education is disproportionately expensive for LEAs which sometimes make cuts in the interests of economic efficiency. In *R. v. East Sussex County Council* ex parte *Tandy*,[82] the House held that an LEA was acting unlawfully when it reduced the amount of home tuition it provided for a girl with myalgic encephalomyelitis, who also suffered from dyslexia, from five hours to three hours per week. The LEA had been faced with a budgetary deficit and looked to make overall reductions in its home tuition budget from £100,000 to £25,000. The legislation imposes a duty on LEAs to make suitable arrangements for part-time or full-time education at school or otherwise for those children of compulsory school age who would be unable to receive suitable education at school by reasons of illness, exclusion or otherwise.[83] The court found that the LEA owed this duty to the individual child rather than a class of children and that the suitability of the education to be provided ought not to be determined with reference to financial considerations. The court also maintained that the LEA acted unlawfully by withdrawing resources from a service which it was under a duty to provide.

School Admissions

Legal challenges to school admissions decisions are common. Often these challenges question the approach of the appeals panel. However, some concern the admission arrangements themselves. Since 1982 parents have had a right to state a preference for a particular school for their child to the authority that decides on school admissions, often the LEA.[84] In *R. v. Rotherham MBC* ex parte *Clark and Others*,[85] the LEA allocated school places primarily on the basis of residence in a zone. The LEA notified the parents that they should complete a form if they did not want the place allocated. Both the High Court and the Court of Appeal held that the LEA's policy did not enable the parents to express a preference and, as such, was contrary to the legislation.

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[79] Phelps (Court of Appeal), *supra*, Lord Justice Stuart Smith at p.609.

[80] Ibid

[81] Ibid. p.610.

[82] [1998] E.L.R. 251.

[83] 1996 Act, s19, formerly s.298 of the Education Act 1993.

[84] This is currently governed by the Education Act 1996, s411.

[85] [1998] E.L.R. 152.

In another important admissions case, *R. v. Secretary of State for Education and Employment and the Governors of Southlands Community Comprehensive School*,[86] a father assaulted the head teacher and threatened his deputy when a dispute arose over his child. When the father sought a place at the school for another of his children, the teachers threatened a boycott if the child was admitted. After the admissions authority refused to admit the child, the court ruled that the father's behavior and the potentially hostile environment at the school were legitimate factors in this decision.

Exclusion from School

Another important area of legal challenge has been exclusion from school. Reform of the legal framework was discussed above. Procedure is important in this area. *R. v. Governors of Bacon's City Technology College* ex parte *W.*[87] emphasizes the importance of permitting parents to see all relevant evidence put forward by a school to support its case for exclusion and the need for the exclusion appeal panel to hear from the excluded child where appropriate. It also establishes that the proportionality of the punishment (to exclude) must be considered. For example, if more than one child was responsible for a particular incident there may be unfairness if one is picked out and others are not. As noted in *R. v. Roman Catholic Schools ex parte S*,[88] the process of identification of the alleged culprit is also important. Here Moses, J., confirmed that in cases of this nature there could be no objection in principle to reliance on hearsay evidence. He was, however, critical of the appeal panel's failure to probe fully into the circumstances in which the identification of the child had been made. In *R. v. Northamptonshire CC ex p W*,[89] Laws. J., emphasized the importance of having appeals panels explaining decisions which make it clear why the extreme measure of exclusion was justified.

Teachers are bound to feel a little concerned where an excluded child who had presented disciplinary problems is reinstated following an appeal. In *R. v. South Tyneside Education Department* and the *Governors of Hebburn Comprehensive School ex parte Cram*,[90] the child was taught on a one-to-one basis following his withdrawal from mainstream teaching. Even though there was a threat of industrial action by teachers at the school if the child returned to class, the court did not regard this possible action to constitute unlawful conduct justifying its intervention.

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[86] [1998] E.L.R. 413.
[87] [1998] E.L.R. 488.
[88] [1998] E.L.R. 304.
[89] [1998] E.L.R. 291.
[90] [1998] E.L.R. 508.

Universities

Most universities are publicly-funded but enjoy a high degree of autonomy over academic matters.[91] Even so, if a university's decision-making process does not operate fairly, it is open to legal challenges which are common but hardly ever succeed. *R. v. Liverpool John Moores University* ex parte *Hayes*,[92] offers a reminder to those with complaints against their universities to use internal appeals processes in the first instance. The court found no fault with the internal procedures as Collins, J., wrote "it would be quite impossible for any judge to order that [the complainant] be awarded an honors degree."[93] There was a similar outcome in *M. v. London Guildhall University*[94] when a student was awarded an unclassified (non-honors) degree in Law. Auld, L.J., reminds us of "the primacy of the university authorities where proper machinery is provided for the regulation of issues between them and those making complaints about their performance of their university duties."[95] Finally, in *R. v. Leeds Metropolitan University ex parte Manders*,[96] an applicant failed to satisfy the court that the university had not taken proper account of the mitigating circumstances he put forward to explain his performance in his Law examination.

Conclusion

In this chapter the author has explained the key changes to the schools system in England and Wales made by the School Standards and Framework Act 1998. The Labour Party's reforms to education have the overriding combined aim of raising standards of education and levels of academic achievement of children and contributing to the reduction in levels of social exclusion. The price to be paid by education professionals, both teachers and administrators, is the taxing process of change and the intensification of an already burdensome regulatory framework. Indeed, the latter is said to have contributed to the relative paucity of applicants for senior management positions in schools, especially for head teacher posts. The Government is now seeking to tackle this shortage by reforming the pay and career structure of the teaching profession, albeit by linking rewards to performance, monitored via annual appraisal arrangements,[97] and by minimising administrative burdens on teachers.[98] Survey after survey in the United Kingdom shows morale among teachers to be a very low ebb, so there is a major problem to be overcome.

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[91] *See* D. Farrington, *The Law of Higher Education* (London: Butterworths, 1998).

[92] [1998] E.L.R. 261.

[93] *Id* at 279C-D.

[94] [1998] E.L.R. 149.

[95] *Id* at 151A-B. *See also* R. v. University of Nottingham *ex parte* K [1998] E.L.R. 184.

[96] [1998] E.L.R. 502.

Education has become a lawyer's paradise in England and Wales. The policy arguments of the Court of Appeal in *Phelps* indicate that the courts may be concerned about the current volume of litigation, particularly when private law principles are invoked against public education providers. Educational malpractice litigation may now have reached a dead end. However, education cases in general seem unlikely to decrease in number or overall range over the coming years, particularly as the complex new 1998 Act is now implemented and the forthcoming reform of the law of special educational needs, which was not affected by the 1998 Act, is in prospect. Change and legal conflict often go hand in hand where public services are concerned. A further factor will be the implementation in 2000 of the Human Rights Act 1998. Its provisions banning denial of the right to education in accordance with parents' religious or philosophical convictions and outlawing racial, gender and religious discrimination will create new or reinforced bases for legal challenges in the education context.

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[97] *See* note 24, *supra*.

[98] Department for Education and Employment, Reducing the Bureaucratic Burden on Teachers Circular 02/98 (London: Department for Education and Employment, 1998).

NEW ZEALAND

Paul Rishworth

Introduction

This being the first entry for New Zealand in the *Yearbook*, it is appropriate to begin with a brief account of the constitutional and statutory setting in which education is delivered. Such an approach provides the context for a review of current and emerging legal issues in New Zealand education. The emphasis here is placed on primary and secondary education. While tertiary education reforms are now being debated, and the Government's proposals are on the table, a fuller account of that is best left until next year.

The Constitutional Framework

The Treaty of Waitangi

New Zealand, a unitary state in the South Pacific, was founded in 1840 when the British Crown, having entered into the Treaty of Waitangi with the indigenous Maori tribes, asserted territorial sovereignty over the islands of Aotearoa. The Treaty, the closest thing New Zealand has to a founding document, sets out certain rights guaranteed by Queen Victoria to the Maori people. Once regarded as being of limited historical interest only, the Treaty and its promises have, over the past fifteen years, become increasingly prominent in the development of social policy. This has come about, in part, due to Maori political protest throughout the 1970s, but also because of the perceived moral suasion of the Treaty promises and the generally acknowledged failure of past governments to observe them, especially in relation to land acquisition from Maori.[1] Even so, since it is a treaty and not a statute, the Treaty of Waitangi technically forms no part of the country's legal system. Treaty-making is an executive function both in the United Kingdom and in New Zealand and treaties cannot be a direct source of rights in domestic law save to the extent that the obligations they contain are enacted into law by Parliament.[2]

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[1] As with native Americans in the United States, most land once owned by Maori has passed out of Maori hands and there are claims (many of which are demonstrably justified) that the Crown acted unfairly in acquiring the land. Since the Treaty contained a promise to affirm Maori ownership of lands and forests, this state of affairs constitutes a breach of the Treaty. The broken Treaty promises (and resultant separation of Maori from their resources) have come to symbolise the cause of Maoridom's over-representation in lower socio-economic groups, in the prison population, and (in the field of education) school suspensions. For example, in 1998 Maori students accounted for 43.8% of school suspensions, while representing only 19.9% of the school population.

The rise in political power of Maori now ensures that, in most fields of public policy, legislation does, in fact, give practical expression to Maori aspirations under the Treaty. Of course, whether it goes far enough in that direction, or too far, is often a point for debate. The scope of debate is greatly increased by the brevity and vagueness of the Treaty which, in its Maori version, promises the Maori continuing rangatiratanga or chieftainship over (*inter alia*) their lands and forests and taonga katoa, the latter term now being generally taken to mean "all other sacred treasures" and hence to include such things as Maori language and tikanga (lore and custom). It follows that there are few areas of public life and social policy to which the Treaty is not now perceived to speak, even if discerning its message requires political negotiation and compromise.

Even so, as long as the Treaty remains outside the formal legal system, there is no scope for calling the legislature to account before the courts for its perceived shortcomings (or excesses) on the Treaty front. It is for this reason, as much as any, that there are no definitive statements on just what the Treaty means. The impact of the Treaty on education is considered further below.

Parliamentary Supremacy and the Common Law Constitution

When the Treaty is put to one side, the remainder of the constitutional landscape in New Zealand is rather straightforward, even spartan. Initially, New Zealand's Constitution was supplied by a series of 19th century English statutes accompanied by prerogative instruments establishing the office of Governor (the Queen's Representative). Full independence from the United Kingdom was gained in the early 20th century, but the old English statutes continued to provide the legislative framework for the country until 1986. In 1986, the New Zealand Parliament enacted its own Constitution Act, declaring the old English statutes to be of no further effect in the country, and asserting on its own behalf the "full power to make laws." One lingering consequence of this English heritage is that the New Zealand Parliament continues to enjoy the same so-called "supremacy" as its United Kingdom counterpart. There is no higher-law constitution that created and empowered the New Zealand legislature. Hence there is no clear basis for any judicial finding that its law-making powers have been exceeded. The orthodoxy, then, is that no court may declare any statute unconstitutional. The citizen's protection from despotic legislators lies instead in the triennial election and the basic decency of elected politicians.

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[2] Of course, it is by no means self-evident that this basic rule should be applied to the very Treaty which made it possible for English law and institutions to be imported. The irony that the Treaty, though foundational in fact, remains outside the legal system is certainly not lost on the current generation and, at one level, it is this consideration which fuels increased respect for the Treaty amongst politicians and policy-makers.

For the same reason, there is no Bill of Rights on the American model.[3] While a Bill of Rights was mooted in the mid-1980s, it was dropped as a result of widespread public opposition to the perceived transfer of political power from the legislature to the judiciary. A statutory Bill of Rights, the New Zealand Bill of Rights Act, was enacted by Parliament in 1990, but it is something different insofar as it affirms stated rights only against executive or administrative infringement. Legislation must be interpreted in a manner that best protects rights, but judicial invalidation is expressly prohibited. The affirmation of Parliamentary supremacy was designed to ensure that contentious issues about rights and social policy should remain a matter for the political rather than judicial sphere. Litigation over civil rights and discrimination has, therefore, not featured prominently in New Zealand. Individual liberty has traditionally, and it must be said very effectively, been protected by this basic tenet of the common law: that the state needs justification in positive law if it is to invade the property or the bodily integrity of the individual. This is why the Constitution is sometimes described as a common law constitution. Basic common law understandings of liberty are the unarticulated backdrop against which legislation is devised, enacted, and construed. Much lies in the principle of judicial independence and the willingness of judges to hold the legislature to legal standards, just as in the United States.

There are signs of changes in the making. Since the late 1960s, New Zealand has acceded to all major international instruments on human rights, including the Optional Protocol to the International Covenant on Civil and Political Rights, permitting individual communications to the United Nations Human Rights Committee. Many of these instruments require the enactment of domestic law to implement the affirmed rights. This was the genesis, for example, of the Human Rights Act 1993, which prohibits discrimination in most areas of public life and employment, including education. The 1993 Act established a Human Rights Commission with the statutory task of receiving and mediating discrimination complaints, and prosecuting the unresolved complaints before a further tribunal. Accession to international human rights instruments also partly explains the New Zealand Bill of Rights Act 1990 which, as its preamble says, was to affirm the rights in the ICCPR. Other recent enactments have created further statutory rights and corresponding enforcement mechanisms such as the Privacy Act 1993 and the Health and Safety in Employment Act 1994.

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[3] This is now something of an irony, because the United Kingdom herself is a party to the European Convention on Human Rights and in 1998 enacted a Human Rights Act which permits, if not judicial invalidation of laws, then at least judicial declarations that a law is inconsistent with the Convention.

The results of these new laws has been to increase the public (and, significantly, parents' and students') perception of individual rights. At the same time, the dramatic shrinking of the world through television, pop culture, mass-marketing and technology has meant that most cultural trends (and vices) seen in schools and colleges overseas are quick to manifest themselves in New Zealand. The result is that while the legal structures and patterns of conflict resolution may differ in New Zealand, the underlying issues in education law are much the same as in North America and Europe. That is, they concern such things as the quest for a system of educational administration that will secure best results for all students, the tension between the rights of students on the one hand and the need to offer a safe and effective educational environment on the other, and difficulties of access to special education for the disabled. To put it more simply, there are disputes about drug-testing, body-piercing, hair cuts, uniforms, inadequate funding for special education, low teacher salaries, biases in the curriculum and alleged racism, and sexual harassment. Yet, a catalogue of disputes, such as is inevitable in a legal review, should not obscure the fact that there are also considerable successes in education and that consumer satisfaction is high.

Reforms Under the Education Act 1989

Education has been compulsory in New Zealand from early colonial days. At the same time, the obligation to attend school could always, as in the United States, be discharged at a private school. The current ages of compulsory attendance are from six to sixteen, although the norm is for children to start at age five and leave at seventeen or eighteen. Public education is the ultimate responsibility of national government and is funded from tax-derived government revenue and municipalities and their associated property taxes have no role. Public education at all levels is presently governed by the Education Act 1989 and its amendments. The history of that Act follows.

The public school system had, until 1989, been operated by the Department of Education, a branch of the executive arm of Government. The Department employed teachers, owned and managed schools, developed the teaching curriculum, and operated the inspection and certification systems designed to ensure quality. In 1987 and 1988, a

Government-appointed task force reviewed educational administration, recommending a significant change in direction and philosophy. The Government's own subsequent discussion paper, based on that review, was entitled *Tomorrow's Schools – the Reform of Education Administration in New Zealand.* The Education Act 1989 duly implemented the thrust of that paper. Its principal theme was the devolution of responsibility from the old Department of Education down to community level. Each and every state school is henceforth to have an elected Board of Trustees who hold office for three years.[4] The relevant community was that of each local school, effectively, the parents of students and intending students in the area. The first school trustee elections were conducted in 1992 with subsequent elections took place in 1995 and 1998.

Each newly elected School Board was first required to draft a School Charter after consultation with its local community.[5] Draft Charters were then to be negotiated with and approved by the Minister of Education. Charters were to set out the character and aims of the local school. On acceptance, they constitute an undertaking by the Board to the Minister that the school will be operated in accordance with the Charter. The Secretary of Education is empowered to take proceedings for enforcement of the Charter, although no other person is entitled to do this.[6] So, in relation to parents and students, Charters operate more like manifestos than contractual undertakings to the community. All Charters are deemed to contain certain provisions, notably national education goals, national curriculum statements and national administration guidelines as prescribed from time to time by the Minister.[7] The capacity for local choice by school communities is somewhat circumscribed by the prescription of National Curricula and education goals. However, within those guidelines, designed to reflect truly national interests in education, local school communities have a reasonable amount of room to operate schools with a distinctive flavour.

A consequence of the reforms was that the Department of Education was transmuted into a much leaner Ministry of Education, concentrating on the provision of policy advice to the Minister and a higher level of oversight. It eschews involvement in the day-to-day affairs of schools since these are now in the hands of Boards of Trustees. A school's Board of Trustees is given "complete discretion to control the management of the school as it thinks fit"[8] except to the extent that any enactment or the general law of New Zealand provides otherwise. A school principal is "the Board's chief executive and has "complete discretion to manage as the principal thinks fit the school's day to day administration."[9] Boards employ principals and staff, although salaries are set and paid on a national basis on a basic scale set by negotiation between Government and the two teacher unions that represent, respectively, primary and secondary teachers.

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[4] *See* Part IX of the Education Act 1989.

[5] Education Act 1989, s 61.

[6] Ibid, s 64. As it happens, the Secretary never has taken such proceedings. The sanction of choice for a non-performing School Board is in s 107: the power to dissolve a non-performing Board and appoint a Commissioner to take over its functions.

[7] Ibid, s 60 A.

[8] Ibid, s 75.

New entities were created under the 1989 Act to serve other educational functions that had previously been within the province of the old Department of Education. A Qualifications Authority scrutinises and oversees standards for qualifications in secondary and post-school education and training.[10] An Education and Training Support Agency administers various training schemes.[11] The Education Review Office reviews the performance of educational institutions to ensure quality standards are maintained.[12] The periodic visits of the latter institution to every school are taken very seriously by schools and their communities, and the media have taken special interest in highlighting negative and hard-hitting reviews by ERO, of which there have been more than a few.

The aim of these reforms is to make schools responsive to their communities and to facilitate excellence in education. After six years, the majority of the New Zealand parent community appears reasonably satisfied with these reforms. A September 1998 *New Zealand Herald-DigiPoll* survey reported 85% of parents with children still at school to be satisfied with the schooling of their children, and 65% feeling that they "have a genuine say in how [their] school is run."[13] At the same time the cost of so-called free education is going up, with parents asked in most schools to contribute voluntary fees as donations to fund school activities. Not surprisingly, in this climate, the schools in poorer areas fare the worst. In the free market of school enrollments, the successful schools are oversubscribed with applications, while others struggle to fill their premises to capacity.

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[9] Ibid, s 76.
[10] Ibid, Part XX.
[11] Ibid, Part XXI.
[12] Ibid, Part XXVIII.
[13] *New Zealand Herald*, September 2, 1998, page A13.

The Rise of "Education Law"

It was recognised from the beginning that locally elected school trustees needed training and support in their important role as manager of their school and employer of staff. A School Trustees Association provides some of this support, providing resources and operating field officers throughout the country. So far as legal matters were concerned, one of the obvious effects of the reforms was to devolve to school boards the responsibility for obtaining their own legal advice as to the consequences of their actions. The Department of Education had, in its old incarnation, provided legal advice to schools, but would do so no longer. In the first two or three years of *Tomorrow's Schools* a succession of high profile and costly employment law disputes between school boards and principals brought it home to boards (and their insurers) that legal guidance was needed at an early stage. While some school boards are lucky enough to have trustees who are lawyers, or will have access to legal advice through their parent community, many others will need to pay for legal advice. The result has been the rise of the education law practitioner, and there are now a number of lawyers, and one or two boutique law firms, that have positioned themselves in this market. Similarly, there have been several seminars on education law. The establishment in New Zealand of an Education Law Association is a further testament to the development of education law as a discrete discipline.

School Governance Issues

Schools in the lower socio-economic areas tend not to be as well served by locally elected board-members as those in the upper and middle-class areas. This contributes to the growing gap between lower ranked and top-ranked schools, the former suffering from a lack of both financial and human capital. While the pendulum of school governance has not yet swung away from the 1989 reforms, there are signs it may soon do so. The Minister of Education has commented that a "one size fits all" approach may not work for small schools which have to struggle to "throw" together the right people to form a board of trustees. One possibility recently mooted is to group a number of poorly performing schools in an area together under one board. The President of the School Trustees Association warned that this could lead to "miniature education boards running the schools" in a community's area.[14] That is, it could be perceived as a return to the bad old bureaucratic days.

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[14] *N.Z. Education Review*, July 29, 1998, p. 16.

One of the early problems emphasised in the employment disputes was the proper allocation of power and responsibility between principal and Board. Many schools had to wrestle with the dividing line between general policy for the Board and day to day management for the principal. A lingering area of contention in educational management, often pitting teachers against boards, is so called "bulk funding" of teacher salaries. The default setting is that teachers are paid at nationally agreed rates, by central payroll authorities. Even so, school boards may opt for bulk funding, whereby the funds needed to pay their staff are granted directly to them. This creates certain options for bulk funded schools as to how they deploy their grants but is vigorously opposed by the teacher unions who see it as creating incentives for schools to recruit junior teachers at lower rates than more experienced ones. For its part, the Government is keen that all schools elect the option and in 1998 offered extra financial incentives for them to do so. At present 24% of primary, 53% of intermediate, and 30% of secondary schools are bulk funded.[15]

Enrollments and Zoning

A major plank of the reforms was to produce community responsive and reflective schools that were open to all-comers, with no "zoning" – that is, no local residence requirement. Individual school boards could pursue excellence in their school, and hence attract more students and the government funding that came with them. The legal regime to facilitate this revolves around the principle of unfettered school choice for students and their parents. Schools can turn students away only if they have introduced an "enrollment scheme."[16] That is permitted only when there is, or would otherwise be, overcrowding. Enrollment schemes at successful schools have turned out to be one of the more controversial aspects of the reforms since they are the point at which articulate middle class parents typically encounter the new regime in a tangible way.

The problem is that as the "baby boom" generation's children reached school age, there was a massive increase in the school population in certain metropolitan areas. Popular, that is, recognised high-achieving, schools continue to receive many more applications than there are available places. All have had to introduce enrollment schemes. The Education Act is silent on the criteria by which schools are allowed to choose between applicants, save that schools must comply with the Human Rights Act 1993 which is New Zealand's anti-discrimination statute. It is possible, although not required, that an enrollment scheme will include a so-called "home zone," whereby preference is given to those within a certain geographical area of proximity to the school. However, other schools may list proximity as simply one factor amongst others. Apart from that, criteria favoured by schools in enrollment schemes appear to be generally worded – along the lines of "proven self-motivation and good work habits" or "commitment of parents/guardians and applicants to the wider life of the school." This, it has been said, allowed schools to choose students who were expected to advance their reputations: the academically gifted and the cultural and athletic achievers. This had the result, especially if there was no home zone in the scheme, that students who might live close to the school did not gain access to it. This caused resentment and political agitation, and led, ultimately, to pressure for legislative reform.

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[15] *N.Z. Education Review*, 19 February 1999, p. 3.

[16] Enrollment schemes are dealt with in ss 11A to 11Q of the Education Act 1989.

An Education Amendment Act was enacted in late 1998. The amendment relating to enrollment schemes was rather circumlocutory, appearing to be searching for a way of requiring schools to accept local students without actually saying so expressly, since that would signal a return to the concept of strict zoning and away from the "choice" that underpins the 1989 reforms. School boards are now required to ensure that their scheme "reflect[s] the desirability of students being able to attend a reasonably convenient school" and that it "enables the Secretary [of Education] to make reasonable use of the existing network of schools." Further, schemes must be approved by the Secretary of Education (the Ministry's Chief Executive).[17]

The explicit requirement that enrollment schemes comply with the Human Rights Act also raises contentious issues, some of which are distantly related to desegregation issues in American school districts. The issue arises when schools seek to give a preference to the sons or daughters of past pupils (and, less contentiously, to the siblings of past or present pupils). The question, then, is whether reference to family connections with a school amounts to prohibited discrimination under the Act. The immediately obvious ground of unlawful discrimination is "family status," a term defined in the Act to include being a relative of a particular person. This well-intentioned prohibition was probably meant to preclude discrimination against the relatives of unpopular or infamous persons, but turns out to be problematic in its interpretation because, in a sense, everyone is a relative of a particular person. Also, if it is unlawful to take into account a parental connection with the school, it is equally unlawful to take into account a sibling connection. Yet few would applaud a ruling from the Human Rights Commission which required that no thought be given to keeping siblings together at one school. Further questions arise as to racial discrimination: the criteria operate in an indirectly discriminatory manner on the children of immigrants, since their parents are unlikely to have family connections to any New Zealand school. Similarly, schools in traditionally upper-class areas will not have had many Maori or Pacific Island pupils in the 1950s and the children of that generation are also now deprived of access to the "family connection" criterion. Although all of these issues have been around for several years and prompt a spate of individual complaints to the Human Rights Commission annually, there has been no published ruling or litigation. This points to one of the down sides of an anti-discrimination law regime that emphasises mediation and settlement: ad hoc resolutions, that satisfy the individual parties, prevent dispositive test cases. Such a situation is exacerbated since there is no civil rights culture and no fee shifting statutes or other means to finance litigation over matters of principle.

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[17] *See* new s 11B introduced by s 5 of the Education Amendment (No 2) Act 1998.

Discipline in Schools: Suspensions and Expulsions

Corporal punishment was formally abolished by statute in 1990, but had been disappearing from most public schools well before that. The ultimate forms of school discipline are now limited-term and indefinite "suspensions," the terms used for students under sixteen, and "expulsions," the term for those over sixteen and who do not therefore have to be in any school. The Education Act sets out three possible grounds for suspension and expulsion: "gross misconduct or continual disobedience which is a harmful or dangerous example to others," and behaviour likely to cause serious harm to that student or others.[18] Principals may make the initial decisions, but suspensions longer than three days, or indefinite suspensions, must go before the Board of Trustees which can lift a suspension, conditionally or unconditionally, or extend it. When students are over sixteen and have been suspended by the principal for an unspecified period, the Board may either reinstate or expel the pupil.

The number of suspensions and expulsions has now grown to alarming proportions. Total suspensions doubled between 1992 and 1997. In 1998 there were 11,929 suspensions out of 702,276 school enrollments.[19] Among the reasons postulated are rising drug use by some school students, and behaviour problems caused by poor parenting, itself traceable to lowering income levels for lower socio-economic groups. It is also suggested that sometimes schools are too quick to resort to indefinite suspensions, which effectively require a student's enrollment in some other school and hence the mere transfer of problems.

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[18] Education Act 1989, s 13.

[19] The number is that of actual suspensions and expulsions, rather than actual students suspended or expelled. It is possible that some students are suspended more than once.

Youth Law Project, an advocacy group that supplies legal advice and representation for students, points to unfairness in administrative procedures used by many schools, due process concerns, to use the American terminology. Only a few of these cases get to court as they are conceived in New Zealand as administrative law cases: that is, the question is whether the principal and board have properly applied the statutory criteria for suspensions or expulsions and have accorded students their "right to a fair hearing." Very few of these cases are fought over whether the underlying reason for discipline was a valid one or, in other words, whether, for example, the school was entitled in the first place to promulgate the rule which the student transgressed.[20]

The leading case on school suspensions is *M. & R. v Palmerston North Boys High School Board of Trustees*[21] in which the school, applying its zero tolerance policy for alcohol consumption by students, expelled a pupil who consumed a very small amount of beer on a school trip. The suspension was set aside by the Court on the ground that the Board essentially failed to exercise its statutory mandate of assessing the culpability of the student's actions to determine whether they rose to the level of gross misconduct. Rather, the Court was of the opinion that the Board fettered its discretion by imposing on itself a blanket rule that alcohol consumption always justified suspension. This decision underlined for all schools the need to take each case on its own merits. Even so, a school is not precluded from making it clear in advance that certain infringements of school rules will be treated very seriously. It just may not do so inflexibly.

The leading suspension case in 1998 concerned an expulsion of a student from one of Auckland's leading boys' public schools for smoking on a school trip. This case produced a seventy-five page judgment declaring that the Board's decision was invalid because it failed to consider each of the statutory options available to it in light of evidence that the possibility of conditional reinstatement had not been considered at the hearing. The Court also pointed out that, at its formal hearing, the Board added the charge of continual disobedience to those the boy faced without giving him notice of its intention to do so. Even though this was a fairly routine application of administrative law principles, the significance of the case lay in the Court's careful scrutiny of the Board's actions, deemed necessary by reason of the seriousness of the consequence of expulsion ("a significant blot on his escutcheon").[22] No damages were awarded, although significant damages had been claimed. The Court doubted the student's contention that the Bill of Rights protection against "disproportionately severe treatment" was intended to have any application in such circumstances.

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[20] One of the few reported education law cases did concern the legitimacy of a rule about hair length. The Court had little difficulty in holding that this was within the range of reasonable options that the School Governors (under the old 1964 Education Act) could take: Edwards v. Onehungs Boy's High School Board of Governors [1974] 2 N.Z.L.R. 238 (CA).

[21] High Court, Palmerston North, CP 302/90, 5 December 1990.

An Education Amendment Act passed in late 1998, but not yet in force, will alter the discipline regime. Now there is to be a range of responses to behavior with varying degrees of seriousness. The grounds for discipline are the same, but the responses now include a stand down period for up to five days in a school term and a revised power to impose conditions that are designed to facilitate the return of a student to the school.

Reckoning with the "Rights Revolution"

The New Zealand Bill of Rights Act 1990 was almost simultaneous with the education reforms. As noted already, the New Zealand Bill of Rights differs in impact and scope from its eponymous American predecessor. It is not a Bill of Rights imposed on the government by "the People." Rather, its principal mission is to create a set of statutory rights for persons which then operate as immunities from governmental and bureaucratic action. The affirmed rights are of the sort familiar in bills of rights, and their wording owes much to the International Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms, the latter serving as a useful precedent being from a country with a broadly similar legal tradition. Of particular relevance to schools are the following rights:

> SECT. 9. RIGHT NOT TO BE SUBJECTED TO TORTURE OR CRUEL TREATMENT— Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.
> SECT. 13. FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION — Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
> SECT. 14. FREEDOM OF EXPRESSION — Everyone has

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[22] D. v. M. and the Board of Trustees of Auckland Grammar School, High Court, Auckland, M477/97, 11 June 1998.

> the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
>
> SECT. 15. MANIFESTATION OF RELIGION AND BELIEF — Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
>
> SECT. 19. FREEDOM FROM DISCRIMINATION — (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

It will be recalled that the power of school boards is subject to "any enactment or general law which provides otherwise." Hence the rights in the Bill of Rights could potentially render unlawful a school rule or the conduct of a school official to the extent it constituted an unreasonable limitation of a guaranteed right.

Although the Bill of Rights is relatively new, it has begun to work its way into the consciousness of New Zealanders, most of whom will hear of it through media reports of its invocation in court by criminal defendants. It is not uncommon for students and their advisors to invoke the Bill of Rights in disputes over educational issues, especially personal appearance rules. Several times a year there are media reports of student suspensions or other disciplinary actions over such matters as tongue studs, hair length, or clothing. None of these has escalated to litigation, although it is often threatened. A typical result is that the determined wearer of a tongue stud will move to a more permissive school. This might be said to illustrate the virtues of the *Tomorrow's Schools* regime, since schools will have different flavours.

Many state schools have uniforms and there is some uncertainty over whether the Bill of Rights with its freedom of expression guarantee renders these unlawful. Certainly it is difficult for a school which does not presently have a uniform to introduce one, although the Bill of Rights probably plays only a small part in that. My own opinion is that it is most unlikely that a court would hold an existing school uniform policy to be unlawful in terms of the Bill of Rights. It must follow that the Bill of Rights would not prevent a school from introducing one.

The issue is inevitably tied up with the question of judicial deference to judgments of school boards, for it is to be expected that courts will be wary of being made the courts of appeal for such decisions. A 1993 case, the first under the *Tomorrow's Schools* regime,[23] drew in part on American jurisprudence in rejecting a rigorous standard of judicial review for school board decisions that did not seriously affect the rights of students.[24] The case was influential because of its conclusion that the 1989 reform, with its devolution of power to elected boards, suggested that dissatisfaction with school decisions was to be pursued through school political channels rather than legal challenges.

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[23] [1993] 2 N.Z.L.R. 478.

Another area of rising importance in the area of rights field has been search and seizure in schools. Generations of past students remember the occasional drag-net search in which a teacher searches for stolen property by requiring all students to open their bags or desks. On occasions in recent years, students have been asked to remove clothes prior to being searched. The last two publicly revealed incidents of strip searches have generated litigation of one sort or another. In 1991, a group of boys were strip searched at Napier Boys High School. This led to an inquiry by the Commissioner for Children, and a subsequent written report in which the legal basis for the search was explored, and found wanting.[25] However, the matter proceeded no further. In 1995, two female teachers in a search for a missing fifteen dollars, strip searched an entire class of secondary school age girls. This case led to litigation which was settled before trial by the payment of money damages.

Search and seizure in schools is a vexed subject because there is no express legal basis for either in the Education Act. One possible conclusion is that there is simply no legal power to search due to the general principle in English law whereunder any non-consensual touching of person or property is a trespass. Consent is itself a problematic basis for searches in schools since the power imbalance between teacher and pupil must make pupil consent readily subject to challenge after the event. Certainly, outside the school context, there is no basis for a personal or property search of any person, adult or child, without consent. And, contrary to the position in the United States, the Bill of Rights restriction on unreasonable searches is not taken to empower a reasonable search. A search power must be located in positive law.

Based on United States and Canadian authority,[26] I have suggested in an article on the subject that there is in the Education Act an implicit power to search students, resting on the need for schools to maintain a safe and orderly educational environment.[27] That implicit power is plainly governed by the Bill of Rights; that is, it is only a power to undertake reasonable searches. What is reasonable depends on the circumstances, but some key principles must be individualised suspicion and no disproportionate invasion of privacy. Many, if not most, schools operate a policy that permits searches under conditions reflecting these principles.

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[24] Maddever v. Umawera Sch. Dist. Bd. of Trustees [1993] 2 N.Z.L.R. 478, citing Zeller v. Donegal Sch. Dist. Bd. of Educ. 517 F 2d 600 (1975) and Frankfurter J. in West Virginia State Bd. of Educ. v. Barnette 319 US 624 (1943), 646.

[25] Re Strip Search at Hastings Boys High Sch. (1991) 1 NZBORR 480 (Commissioner for Children).

[26] A recent Canadian authority which supports the view taken is R. v. M. (MR), Supreme Court of Canada, 26 November 1998.

Anti-Discrimination Law in Education

The Human Rights Act 1993 prohibits discrimination on the grounds of sex, marital status, racial origin, ethnic or national origin, religious or ethical belief, age, political opinion, disability, family status, and sexual orientation. Because the Human Rights Act 1993 procedures cost a complainant nothing, they have been used considerably in educational disputes. No case has proceeded to the Complaints Review Tribunal, however. I list some instances:

A school uniform rule was challenged as discriminatory because young girls, unlike young boys, felt precluded from using playground equipment. It was resolved by mediation and culottes.

A school settled a discrimination complaint by allowing a Muslim student to wear long trousers, thereby accommodating his religious preference, even though the uniform required short trousers.[28]

A school was held to have committed racial discrimination as a result of various shortcomings in the manner in which it taught Maori language and in its accommodation of Maori culture, including allegations of not doing enough to foster Maori language education in the school. The Commission decided that this constituted the offering of different terms and conditions to Maori students because their language and culture were not affirmed in the school, whereas Pakeha, English culture and language, were offered. A mediated settlement involved various restorative measures agreed to by the school.[29]

A school was found to have to have perpetrated political opinion discrimination by advertising for teachers who supported direct resourcing. The advertising was held to be a reference to the contentious model of salary financing that schools could opt into. The parties reached a settlement.

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[27] Rishworth, "Search and Seizure in Public Schools," in School Discipline and Student Rights, Legal Research Foundation, 1996.

[28] There is an account of this case, designated K. v. N.Z.L.R. (C149/94) in (1995) 1 Human Rights Law & Practice 34 (published by Brooker's, Wellington).

[29] A lengthier account is given in Rishworth, P., "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum" in *Education and the Law in New Zealand*, Legal Research Foundation Inc, Auckland, 12.

The Race Relations Conciliator, in response to complaints, investigated the draft National Social Studies curriculum in 1997. The first draft had been criticised for perceived over-emphasis of Maori matters, and the second was criticised by a different constituency for having, in response to the first critics, gone too far in the other direction. The Race Relations Conciliator's report was suitably anodyne, recognising that curriculum development itself could not be a discriminatory act, and that determining its content was essentially a matter for the experts. Even so, this incident demonstrates the capacity to find a forum of complaint for a very wide range of educational matters.

In the field of religious instruction and exercises in schools, there has been a series of discrimination complaints over the years. None has been formally brought to a conclusion – indeed, the complainants may have withdrawn them in view of the explicit statutory basis for some religious instruction in schools.

Religion and Values in Education

To many New Zealanders, the special place enjoyed by religious freedom and litigation over religious freedom in United States constitutional law can be perplexing. The major migrations to New Zealand came later than in the United States, and from different sources, and so religion and religious liberty claims have not featured largely in our own history. As in Australia, there has long been a vague but generally benign *de facto* establishment of Protestantism, but even this has ebbed away over recent years. The culture is generally secular, and public appeals by politicians to religious values or references to prayer, such as are common in American politics, have no counterpart here. This absence of a strong religious dimension to public life manifests itself in two principal ways. First, there is not much dissension over religion in New Zealand history. Second, the remaining instances of *de facto* establishment of religion, such as prayers at the commencement of the Parliamentary term, do not excite any great concern. It is as if religion has not ascended to the level of importance that makes it controversial.

Since 1874, there has been a statutory requirement that education in primary schools be secular.[30] Reacting to pressure for leeway, a 1962 statute authorised a practice that had developed, *de facto*, in many areas of New Zealand: schools were allowed to technically close for up to one hour per week, during which there could be religious instruction or observances. This remains the law in primary schools.[31] Parents may opt their children out if they wish. Many schools take this opportunity to have religious instruction, often offered by volunteer community members and usually in Protestant Christian religion. Yet, there is nothing to prevent the religious instruction being in any religious tradition, or even multiple religious traditions providing the the interest and the availability of instructors warrant it. Whether to have religious instruction, and the nature of the religious instruction, is a matter for each school's Board of Trustees.

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[30] Presently the requirement is in s 77 of the Education Act 1964 (remnants of this Act are still in force, despite the passage of the Education Act 1989).

The fact that there is explicit statutory authority for religious instruction in a school immunises it from any possible challenge under the New Zealand Bill of Rights Act 1990. Were such a decision to be simply an administrative one by a Board, it might be legally possible for it to be challenged on the grounds that "freedom of religion" in section 13 of the New Zealand Bill of Rights implicitly incorporates a guarantee of freedom from religion, and hence an anti-establishment principle. The Canadians have taken that step in the interpretation of their own religious freedom guarantee in section 2(a) of the Canadian Charter of Rights and Freedoms.[32] Any such argument is explicitly defeated by section 4 of the New Zealand Bill of Rights, which provides that no court may invalidate a statute or deny its effect by reason of inconsistency with the Bill of Rights. And, of course, it might be that a court would not hold religious instruction on school property to be a breach of the Bill of Rights at all, so long as it is accompanied by an opt-out provision. When the legality of religious exercises in a secondary school arose obliquely in a 1974 case, the Court of Appeal noted the ability to opt out and readily held that the practice was not unlawful.[33]

In secondary schools there is no express requirement that education be secular, nor is there any express authorisation for religious instruction. Some secondary schools, less now than in the past, have a tradition of prayer, hymns, and Bible readings at assemblies. The Court of Appeal case mentioned in the last paragraph legitimated the practice, although it is conceivable that the matter could be revisited under the New Zealand Bill of Rights Act 1990 which converts religious freedom from a common law understanding to a statutory right. As there is no express statutory basis for religious instruction in secondary schools, it is vulnerable to a Bill of Rights challenge. The fact that there has been no such challenge is a function of New Zealand culture: litigation is not favoured and there are no civil liberties organisations such as would fund this type of suit.

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[31] In the United States this arrangement would presumably be unconstitutional in terms of McCollum v. Board of Educ. 333 US 203 (1948).

[32] *See* R. v. Big M Drug Mart Ltd [1985] 1 SCR 295. *See also* Zylberberg v. Sudbury Dep't of Educ. (1988) 65 OR (2d) 641 (CA).

[33] Rich v. Christchurch Girls High Sch. [1974] 1 N.Z.L.R. 1 (CA).

Even so, there is no doubt that the general social climate is such that any school deciding whether to commence such practices will certainly reckon with a heightened awareness of the issues. Greatly increased immigration throughout the 1990s, especially from Eastern European, Muslim, and Hindu countries, has led to greater diversity and an awareness of a need to recognise minority cultures.

State Funding of Religious Schools

There is no explicit anti-establishment principle in the Bill of Rights. Rather, to the extent the principle is acknowledged, it is part of the common law understanding that forms the basis of the New Zealand Constitution. In the 1970s, in the face of a funding crisis in Catholic education, Parliament enacted legislation that allowed private schools of any religious or philosophical character to integrate into the state system. This meant that the entire operational budget could be publicly funded with the school providing the capital assets. Many religious schools have now integrated and are allowed under the Act to retain their "special character," be it religious or philosophical, with exemptions from anti-discrimination law in their hiring and teaching to facilitate this.

There is virtually no public opposition now expressed to public funding of religious schools. Indeed, in recent years the state has come to rely on Catholic schools to accommodate the numbers of students in the main centres needing education. Many non-Catholic parents also seek entry for their children, some perceiving the Catholic schools to emphasise traditional values more strongly. Integrated schools must take students from outside the Catholic church — although this is subject to a ceiling specified in percentage terms in their integration agreement, set at a level that is judged not to threaten the school's special character. A new development in 1999 is that new Catholic schools have been established on land owned by the Crown (i.e., the state), with special legislation being enacted to facilitate that. A Member of Parliament has called this a "partnership between the Government and the [local] Catholic community."[34]

Other schools that have integrated include Jewish and Islamic and Hare Krishna schools, as well as schools centred on philosophical conviction such as Rudolph Stiener and Montessori.

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[34] *N.Z. Education Review*, 4 November 1998, p. 5.

Religious Values in the Curriculum

As a practical matter, most teachers are very sensitive to the issues involved in dealing with religious themes during the school year. New Zealand generates some of the same controversies as the United States, although at a level of intensity considerably reduced. For example, in 1996 a kindergarten association, a body responsible for the employment of kindergarten teachers, was reported to have banned hot cross buns at Easter, in deference to their religious connection. It transpired that this story, which made national newspapers and radio and is still quoted by some as an example of so-called political correctness, was apocryphal. Yet, it did reflect a climate in which it is recognised that there are some deep issues about religious values in public education that will need to be explored at some stage.

There are minor controversies about school readers and the values promoted by them — such as over Alice Walker's novel *The Colour Purple* a few years ago and in 1998 over a book for secondary students said to depict a lesbian relationship — but never to the point of legal action. A provision in the Education Act, section 25A, permits parents to opt their children out of any class for religious or cultural reasons, something which would have assisted plaintiffs in American cases such as *Mozert v. Hawkins County Board of Education.*[35] Oddly enough, that provision was added in 1991 to resolve a dispute over whether a primary school was entitled to make Maori language instruction compulsory. It was expressed to extend also to religious reasons.

Home schooling is on the increase and may be connected to religious objections to public schooling. The number being home-schooled in 1998 was 5,274 students, from 3,001 families. This represents less than 1% of total enrollments.

The Maori Dimension

The Treaty of Waitangi made with Maori tribes is generally regarded as the country's foundational document. In education, a number of significant gestures are made toward the Maori dimension of New Zealand life. They include:

- All school charters are required to be determined only after consultation with Maori in the community. In any event, all are deemed by law to contain the aim of developing policies and practices that reflect New Zealand's cultural diversity, and the unique position of the Maori culture; and the aim of taking all reasonable steps to ensure that instruction in tikanga Maori (Maori culture) and te reo Maori (the Maori language) are provided for full time students whose parents ask for it.

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[35] 647 F. Supp 1194 [36 Educ. L. Rep.] (E.D. Tenn.), *rev'd* 827 F. 2d 1058 [41 Educ. L. Rep. 473] (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 [44 Educ. L. Rep. 100] 1987).

- The Act permits the establishment of Maori language immersion kindergartens (kohanga reo) and primary and secondary schools (kura kaupapa Maori).

To the extent that a certain amount of racial discrimination might be thought inherent in these provisions, it should be pointed out that nothing in the law precludes non-Maori from attending these schools. Oddly enough, however, the Human Rights Act 1993 contains a provision that positively allows for schools devoted to a single race. There are, in fact, several venerable old schools established for Maori students and the provision is no doubt inserted in the law to facilitate their continued operation along with single sex and religious schools. If a "whites only" school were to be established, I have no doubt that the law would be revisited quickly, although, in any event, it is most unlikely that such a school would receive the necessary certification to operate as a registered private school.

At the tertiary level, the Maori dimension is similarly discernible on the face of New Zealand law. The Act allows establishment of wananga, a type of tertiary institution that is to be characterised by teaching and research that maintains, advances, and disseminates knowledge and develops intellectual independence, and assists the application of knowledge regarding ahuatanga (Maori tradition) according to tikanga Maori (Maori custom). Among the duties of Councils of all public tertiary institutions is the duty to acknowledge the principles of the Treaty of Waitangi. At this point it should be re-emphasised that the Treaty itself is brief and does not speak with any specificity on how a tertiary institution should behave, just as it says nothing explicit about health, justice, or other areas of public life. Yet, the expression "principles of the Treaty" has become something of a code in New Zealand public law for an approach to decision-making in which Maori are seen as Treaty partners, with whom there should be consultation on matters affecting their interests, and to whom decision-making should be devolved where possible. So it is that, in the reality of university administration, the Maori dimension is more prominent than the legislation itself might have suggested. The Treaty principles are translated into a variety of specific responses. At the University of Auckland, for example, they include preferences, "quotas" in

American terminology,[36] for Maori applicants in several faculties including law; a Maori Pro-Vice Chancellor of the University; requirements of Maori representation on various committees; and the construction of a marae (ceremonial meeting ground) on campus.

Conclusion

Education law is a growing field of interest and activity in New Zealand. Many of the underlying issues are the same as in the United States of America. Moreover, in many cases, even though there may not be litigation, their resolution is similar. One notable exception is in the area of religion and education where some of the practices in New Zealand would be clearly unconstitutional in the United States. Perhaps the greatest difference is one of culture; litigation over rights is not as common as it is in the United States because of the absence of a higher law constitution. This state of affairs has its advantages, but one disadvantage is that there are, as yet, few judicial decisions. While that tends to minimise academic interest in education law, it obviously does not mean that there is no education law. It simply means that educational practitioners must often resolve matters from first principles.

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[36] Affirmative action is expressly permitted by the Bill of Rights, s 19(2) and the Human Rights Act 1993, s 73. The criterion in s 73 is that it be undertaken to ensure the benefited group has "an equal place with other members of the community". This Delphic provision has not been the subject of any significant litigation (there was one undefended case) but is likely to be so in an age of increasing competition for university places in the professional schools.

SOUTH AFRICA

Izak Oosthuizen

Introduction

South Africa has been going through tremendous changes in the past few years. One of the pillars of change in South Africa has been the introduction of the constitutional era. In fact, this change has "created a paradigm shift of magnitude that is still difficult to grasp."[1] It is also true to say that it is having an effect on all facets and walks of our society, including education.

This chapter offers an overview of the development of Educational Law in South Africa during the pre-constitutional and post-constitutional era. In order to demonstrate the growth of Educational Law, the chapter focuses on specific aspects such as due process, unfair discrimination, corporal punishment, and the teacher's duty of care. This chapter also provides international readers with a basic background of the South African legal system in order for them to appreciate fully the contemporary position of Educational Law in South Africa.

Background to the Legal System in South Africa

The South African legal system has often been described as a hybrid or mixed law system. Basically, and it was even more so during the pre-constitutional years, the South African legal system is a product of Roman, Dutch, and English law.[2]

The sources of South African law are legislation, common law, and judicial precedent. Legislation can be described as the only *ius scriptum* or written law of South African law while the other two sources can be described as *ius non scriptum* or unwritten law.

Legislation

Kleyn and Viljoen describe legislation as the written legal rules drafted by Parliament.[3] Section 2 of the Interpretation Act of 1957 defines it as any statute, proclamation, ordinance or "any other measure which has the authority of legislation."[4]

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[1] Maree, L.M. 1995. Education under the New Constitution. Pretoria: Via Afrika; p.i.

[2] Church, J. 1996. Inleiding tot die Regswetenskap. Pretoria: UNISA (Study Guide); p.25.

[3] Kleyn, D. & Viljoen, F. 1996. Beginnergids vir Regstudente. Kenwyn: Juta & Co; p.52.

The Constitution of South Africa

The Interim Constitution of South Africa was promulgated in 1993.[5] It was followed by the final Constitution of 1996.[6]

According to section 2 of the final Constitution of the Republic of South Africa, the Constitution is the "supreme law" of the country and any "law or conduct inconsistent with it is invalid."[7] This *inter alia* boils down to the point that the South African Constitutional Court has the right (and the obligation) to test the constitutionality of all legislation.

Of particular importance for the purposes of education is the Bill of Rights, which is taken up in Chapter 2 of the Constitution. Among other rights, the Bill of Rights declares that everyone is: equal before the law and that no person may discriminate unfairly against anyone (section 7); has inherent human dignity (section 10); has the right to privacy (section 14); has the right to freedom of conscience, religion, thought, belief and opinion (section 15); has the right to freedom of expression (section 16); has the right to freedom of basic education (section 29); has the right to use the language of his choice and to participate in the cultural life of his choice (section 30); has the right to freedom of association (section 31); has the right to lawful, just and administratively fair administration (section 33).

Original Legislation

Many South African authors make a distinction between original or primary legislation and subordinate legislation. Original legislation refers to legislation promulgated by Parliament. Suboridinate legislation refers to legislation promulgated as a result of authority delegated to an official by original legislation.

Post-Constitutional educational legislation, higher education excluded, promulgated on a national basis, includes the National Education Policy Act, the South African Schools Act and Employment of Educators Act.

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[4] South Africa (Republic). 1957. Interpretation Act, 33 of 1957. Pretoria: Government Printers.

[5] South Africa (Republic). 1993. Interim Constitution of the Republic of South Africa 200 of 1993. Pretoria: Government Printers.

[6] South Africa (Republic). 1996. Constitution of the Republic of South Africa. Pretoria: Government Printers.

[7] South Africa (Republic). 1996. Constitution of the Republic of South Africa. Pretoria: Government Printers.

The National Education Policy Act

The National Education Policy Act, which was promulgated in 1996, aims to:

> 1. Empower the national Minister of Education to determine education policy on a national level. Policy has to be determined in terms of certain principles (including those principles embodied in the Constitution).
> 2. Ensure the monitoring and evaluation of education on a national basis.
> 3. Provide an infrastructure which is required for consultation with a wide variety of bodies.
> 4. Implement the education policy on a national basis.[8]

The South African Schools Act

Some of the objectives of the South African Schools Act of 1996 are:

> 1. to repeal the many educational laws and regulations which regulated the South African educational system in the pre-constitutional years;
> 2. determine a nationally uniform education system for the organisation, management, and financing of schools;
> 3. to devise national norms and standards for the education of all learners; and
> 4. to build national education on the basis of equality (and non-discrimination) and at the same time to protect the variety of South African languages and cultures at school.[9]

Employment of Educators Act

The Employment of Educators Act of 1998 repealed the Educators Employment Act of 1994. The objectives of this Act, as set out in its preamble, are "to provide for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith."[10]

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[8] South Africa (Republic). 1996. National Education Policy Act 27 of 1996. Pretoria: Government Printers.

[9] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

[10] South Africa (Republic). 1998. Employment of Educators Act, 76 of 1998. Pretoria: Government Printers.

Subordinate Legislation

Subordinate legislation, also known as delegated legislation, includes regulations and proclamations promulgated by, for example, the national Minister of Education.

Common Law

Common law is *ius non scriptum* in the sense that it consists of uncodified legal principles based on a legal tradition derived from Roman-Dutch and English law which were developed and adapted to the distinctiveness of the South African legal and cultural environment.[11] Two of the more relevant common law principles which have a bearing on South African education are the rules of natural justice and *in loco parentis*.

Rules of Natural Justice

The rules of natural justice can be condensed to the following principles:

> 1.The *Audi alteram partem* rule, literally to "hear the other side,"[12] whereby a person is afforded the opportunity to state his or her side of the story.
> 2. A person should be informed of the considerations which are to his disadvantage.
> 3. *Nemo iudex in propria causa*, literally, "no one is fit to be judge in his own case."[13] In other words, an administrative authority exercising discretion must be free from bias and unprejudiced.[14] In the past, South African courts considered the following to be examples of bias:[15]
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> - Some monetary or other interest or advantage which affects the decision maker.
> - A personal interest such as a family tie between the decision maker and accused.
> - Prejudice which may be deduced from the way in which the

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[11] Oosthuizen, I.J. (ed.) 1998. Aspects of Educational Law. Pretoria: J.L.van Schaik: p.43.

[12] Hiemstra, V.G. & Gonin, H.L. 1986. Trilingual Legal Dictionary. Cape Town : Juta & Co; p.170.

[13] *Id.* at p.238.

[14] Baxter, L. 1984. Administrative Law. Cape Town : Juta & Co; p.561.

[15] *Id.* at p.561.

decision maker deals with the accused.

- Adverse relationships that exist, or adverse events which might have occurred in the past, between the decision maker and the accused.
- The decision maker has to be objective.
- The decision maker has to pay sufficient attention (or due consideration) to the facts of the case.

In loco Parentis

The common law principle of *in loco parentis* literally requires the teacher to stand "in the place of the parent" and is well embedded in the history of South African education.[16] The common law role of the teacher is to stand in the place of the parent during the course of those educational activities which are related to the school. Although this common law role of the teacher has been modified by various present day statutory measures, it still forms the basis for the teacher's role to maintain order and discipline at school and to take care of the physical and mental safety of the students at school also known as the teacher's duty of care.[17]

Case Law

As in virtually all other countries in the world, the doctrine of precedents or *stare decisis* is applicable to the South African courts.

The South African courts are classified in terms of section 66 of the Constitution of South Africa:[18]

- The Constitutional Court functions as the highest court for all constitutional matters.
- The High Court of Appeal has the jurisdiction to decide on all appeals from the high courts except for constitutional matters.
- The High (Supreme) courts.
- The magistrates courts.

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[16] Lombard, H.S. 1993. Die in loco parentis - posisie van die onderwyser. Potchefstroom: PU vir CHO (M.Ed dissertation); p.7.

[17] Oosthuizen, I.J. (ed.) 1998. Aspects of Educational Law. Pretoria: J.L.van Schaik; p. 89.

[18] South Africa (Republic). 1996. Constitution of the Republic of South Africa. Pretoria: Government Printers.

A Background to the Development of Educational Law in South Africa

Educational Law should be seen as one of the newest disciplines in South Africa. A master's degree dissertation by Van Wyk in 1977 can be regarded as the beginning of a structured in-road into the discipline of Educational Law.[19] The first national symposium in Educational Law was conducted in 1990 at Potchefstroom University. The first international conference in Educational Law was also conducted there in June 1995.

Educational Law really gained momentum in October 1995 when the South African Association for Educational Law and Policy (SAELPA) was established at the University of Pretoria with the support of Belgian, Dutch, and European Associations. In February 1997, the Inter University Centre for Education Law and Education Policy (CELP) was established between the two founding members, the University of Pretoria and the University of South Africa

The pre-Constitutional era of educational law was typified by decisions that turned on common law issues such as rules of natural justice and issues related to the *in loco parentis* position of the teacher. Today, in the post-Constitutional era, the scale is tipping more and more towards Constitutional-related disputes.

Due Process and Rules of Natural Justice

In trying to understand the development of procedural fairness in South Africa, it is imperative to appreciate its relationship with the rules of natural justice. Procedural fairness and the rules of natural justice are similar in scope, contents, and application.[20] However, the South African Constitutional Court also clearly stated that the constitutional right to procedural fairness should not be regarded as a codification of the pre-constitutional rules of natural justice. For the purposes of this chapter, it makes sense to speak of the pre- and post-constitutional period.

The Pre-Constitutional Period

In the period before the interim constitution of 1993, the common law principles of the rules of natural justice formed the basis for procedurally fair administrative actions. A typical example of the application of the *audi alteram partem* rule was in the case of *Bula v. Minister of Education* in 1992.[21] The applicant, a rector of a college of education, received a letter from the education authorities informing him that he was suspended from service pending the outcome of a misconduct inquiry and that his emoluments were to be suspended as well. The applicant, Mr Bula, petitioned that he was not given the opportunity of being heard before the decision was made. The court conceded and held that the applicant's suspension had to be set aside because he had not been given the opportunity to tell his side of the story.

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[19] Oosthuizen, I.J. & Beckmann, J.L. 1998. The history of educational law in South Africa. Australia & New Zealand J. of Educ. L., 3(2): p.61.

[20] Burns, Y. 1998. Administrative Law under the 1996 Constitution. Pretoria: Cape Town: p.165.

In *P. v. Board of St. Michael's Diocesan College*, the appellant, acting on behalf of his son, petitioned that his son's expulsion from the College was illegal.[22] On their way home from school, traveling by train, a number of the College's students breached a school rule prohibiting the drinking of spirituous liquor. While a passenger on the train, the appellant's son also became involved in other forms of reprehensible conduct. The judge held that the headmaster acted within the limits of his legitimate discretion. Of particular importance was the fact that the judge re-emphasised certain aspects of the rules of natural justice — including the requirement of paying due attention to the facts in question. Said the judge, "In the circumstances it is unnecessary to consider whether the rector's finding of facts can be challenged in this Court except where it is so grossly at variance with the available evidence that it is proof of bad faith on his part or *a failure to give due and proper consideration to the question he had to decide*." (author's emphasis).

Legitimate Expectations

A much later addition to the rules of natural justice came via English law. Some of the essentials of this principle are:[23]

> (i) Even before a decision affecting the rights of a person is made by an official, a person has under certain circumstances the right to be heard. This right is based on a legitimate and objective expectation by that person that he will be heard; and
>
> (ii) in order that this doctrine may be applied, it is unnecessary that a right, privilege or freedom should have been impinged upon for a person to be heard. The hearing should take place before the decision is made while the decision-maker still has an open mind on the matter.

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[21] South African Law Reports: Bula v. Minister of Education 1992(4) SA 716 (TK).

[22] South African Law Reports: P. v. Board of St. Michael's Diocesan College, Balgowan 1961 4 SA 440N.

[23] Robertson, J.C. 1991. Legitimate Expectations. SA Publiekreg/ Public Law, 6(2): p. 158.

Legitimate expectations was at issue in Union of Educators' Associations of *South Africa v. Minister of Education and Culture, House of Representatives; Isaacs v. Minister of Education and Culture of 1993*.[24] The Minister in question confirmed in a circular letter that the departmental practice of using substitute educators for those educators who are on study leave would continue during the school year of 1993. In a subsequent circular from the Director of Education, the approach was reversed because due to financial constraints the Department would not be able to afford relief teachers for 1993. The court set the second circular aside on the following grounds:

- It held that the financial difficulties of the department were not such that they justified strict austerity measures.
- During the preceding sixteen years it became practice that the particular department consulted with a representative of the particular teacher's union regarding personnel matters.
- It was a long standing policy of the department to appoint substitute teachers in the place of those going on leave. This created a legitimate expectation in the minds of the applicants of being heard before the decision was made.
- The judge also made the remark that a legitimate expectation might even be based on a right or freedom which does not exist, but which is based on an expectation only. However, such an expectation should be, objectively viewed, a reasonable one.

The Post-Constitutional Period

The basis to an administrative fair process is to be found in the provisions of section 33 of the Constitution of the Republic of South Africa, as read in conjunction with item 23 of Schedule 6 of the Constitution.

> Section 33 provides:
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must:

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[24] South African Law Reports: Union of Educators' Associations of South Africa v. Minister of Education and Culture, House of Representatives; Isaacs v. Minister of Education and Culture 1993 2 SA 82 (C).

> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration.

An abstract from item 23(2) and (3) of Schedule 6 of the Constitution determines:

> (2) Until the legislation envisaged in sections 32(2) and 33 (3) of the Constitution is enacted, (b) section 33(1) and (2) must be regarded to read as follows:
> Every person has the right to:
> (a) Lawful administrative action where any of their rights or interests is affected or threatened.
> (b) Procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened.
> (c) Be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public.
> (d) Administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.[25]
> (3) Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect." (The new Constitution took effect on 4 February 1997.)

It all boils down to the fact that the common law principles concerning natural justice will in the future be embodied in national legislation (and will therefore embrace the rules of natural justice). The provisions (a) - (d) of Schedule 6 concerning administrative action (as quoted in the previous paragraph) were taken from section 24 (a) - (d) of the interim Constitution of 1993.

In *Moletsane v. Premier of the Orange Free State and Another* the head of the particular education department addressed a letter to the applicant, Mr. Moletsane, which reads: "It has been decided that you be suspended from duty, with salary, with immediate effect, pending a departmental investigation into alleged misconduct on your part."[26]

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[25] South Africa (Republic). 1996. Constitution of the Republic of South Africa. Pretoria: Government Printers.

The court had to decide whether the letter had been a valid notice of suspension in accordance with section 14 of the particular Educators Act in compliance with section 24(c) and (d) of the interim Constitution of the Republic of South Africa of 1993. Section 14(2) of the former Educators Act reads: "An educator may at any time, before or after being charged with misconduct, be suspended from duty."[27] Section 24(c) and (d) of the interim Constitution reads:

> Every person shall have the right to:
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.[28]

The court's ruling was that in this instance sufficient reasons had been provided. More important was the way in which the court handled section 24 of the Constitution. When focusing on the development of South African due process in administrative actions in education, it is important to emphasize the following *ratio decedendi*.

> This connotes a correlation between the action taken and the reasons furnished; the more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished. It is important to note that the administrative action in this matter involved the applicant's suspension. This was a preliminary step taken even before the applicant was charged with the alleged misconduct. This action is not as drastic as for example the case in which a person is convicted of misconduct and discharged. In such a case one would expect more detailed reasons to be furnished.

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[26] South African Law Reports: Moletsane v. Premier of the Orange Free State and Another 1996. 2 SA 95 (O).

[27] South Africa (Republic). 1994. Educators Employment Act. Pretoria: Government Printers.

[28] South Africa (Republic). 1993. Interim Constitution of the Republic of South Africa 200 of 1993. Pretoria: Government Printers.

Unfair Discrimination

The political philosophy of apartheid had a determining influence on every aspect of South African society, including education. This political philosophy came to an end with the introduction of the South African Constitution.

The Pre-Constitutional Period

The pre-constitutional period was characterised by legislation that resulted in a fragmented South African educational system based on racial differentiation. Some of these acts were:

- The National Policy Act of 1984 (29)[29]
- The Education Affairs Act (House of Assembly) of 1988,[30] which was promulgated for the education of white learners.
- The Education and Training Act of 1979 promulgated for the education of black learners.[31]

The Post-Constitutional Period

The Interim Constitution of 1993 put an end to the history of apartheid in South Africa.

> Sections 8 (1) and (2) of the interim constitution determined.
> 8(1) Every person shall have the right to equality before the law and to equal protection of the law.
> 8(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.[32]

The first case of unfair discrimination on the basis of race was soon to take place in the South African Supreme Court. In *Matuka and Others*

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[29] South Africa (Republic). 1984. The National Policy Act 76 of 1984. Pretoria: Government Printers.

[30] South Africa (Republic). 1988 The Education Affairs Act (House of Assembly) 70 of 1988. Pretoria: Government Printers.

[31] South Africa (Republic). 1979. The Education and Training Act 90 of 1979. Pretoria: Government Printers.

[32] South Africa (Republic). 1993. Interim Constitution of the Republic of South Africa 200 of 1993. Pretoria: Government Printers.

v. Laerskool Potgietersrus [33] the applicants contended that a number of black children, and in particular the children of the applicants, had been refused admission to the primary school at Potgietersrus as a result of the school's policy to refuse admission to black children. The applicants contended that the refusal implied unfair discrimination on racial grounds. (Clause 5 of the School's Admission Policy specified that a proposed pupil should be white.) The defendant contended that the school was full and that the school had an exclusively Christian Afrikaans culture and ethos which would be detrimentally affected or destroyed by admitting pupils from a different cultural background. The respondent claimed that by refusing admission to the black children they were protecting the internationally protected minority rights of the Christian Afrikaner. The respondent based his arguments on sections 20 and 22 of the United Nations' Charter on Human and People's Rights by virtue of which the Afrikaner as a minority has "an unquestionable and inalienable right to self-determination." Apart from section 4(4) of the Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious or Linguistic Minorities, he also referred to the Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, which was drafted by Francesco Rapertorti, a special reporter for the United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities.

The Court granted an order declaring that the respondent may not, on grounds of race, ethnic or social origin, culture, colour or language, refuse unfairly to admit any child to the school. The court also ordered an interdict restraining the respondent from refusing unfairly on the grounds of race, colour, ethnic or social origin, culture or language to admit any child. The court further directed the respondent to admit the children of the applicants to the school.

In the Constitutional Court of South Africa the matter of *The Gauteng Provincial legislature in re: Dispute concerning the Constitutionality of certain provisions of the School Education Bill*, the applicant contested certain provisions of the School Education Bill of the Gauteng Province.[34] It needs to be explained that the petitioner was the South African Foundation for Education and Training whose mission is: ". . . to support a Christian value system and ascribe to the principle of mother tongue education. The foundation also aspires to promote education in the South African community as a whole with special reference to Afrikaans medium education."

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[33] Supreme Court of South Africa:(Transvaal Provincial Division). Matuka and Others v. Laerskool Potgietersrus. 1996. Case no. 2436/96.

[34] Constitutional Court of South Africa: The Gauteng Provincial Legislature in re: Dispute concerning the Constitutionality of certain provisions of the School Education Bill. Case no. CCT 39/95.

In dealing with education, Section 32 of the interim Constitution stipulates:[35]

> 32. Every person shall have the right
> (a) to basic education and to equal access to educational institutions.
> (b) to instruction in the language of his or her choice where this is reasonably practicable.
> (c) to establish, where practicable, educational institutions based on a common culture, language or religion provided that there shall be no discrimination on the ground of race.

Referring to Section 32 of the Interim Constitution, the Foundation contested the constitutionality of section 19 of the Gauteng Bill which provides: "19(1) Language competence testing shall not be used as an admission requirement to a public school."

The Foundation was of the opinion that to allow students who were not fluent in Afrikaans access to an Afrikaans education institution would endanger the Afrikaans culture. As such, the Court held that "there is nothing in the provision of the Bill which suggests that the challenged statutory provisions form part of a programme calculated to physically eliminate members of the Afrikaans-speaking community or to wipe out their culture." The Court proceeded to say that the fact that non-Afrikaans speaking learners could enroll at a school that is predominantly Afrikaans does not mean that the constitutional rights of the Afrikaans speaking learners are being violated. The court pointed out that if persons were denied access to the school because they spoke Afrikaans, or belonged to a cultural group which identified itself as Afrikaner, they could claim a violation of their constitutional rights. The judge further held that the members of the Afrikaans-speaking community could have complained if they were treated less advantageously than that of other groups and that there is nothing in the Constitution that guarantees the exclusivity of Afrikaans in any school. On the contrary, the promotion of multi-linguism, even leaving out the factor of equal access to schools, would encourage the establishment of dual or multiple-medium schools."

Trying to interpret the true meaning of linguistic equality in the light of the Constitution, Judge Mahomed asked the following question: "Could it possibly be that the framers of the Constitution intended that each language group and each religious community in every one of their multiple spatial conglomerations should have a claim on the State in terms of section 32(c) to establish on their behalf exclusive schools?" He answered this question by saying that such a state of affairs would serve to perpetuate apartheid in disguise with state money and that it would be almost impossible to allocate finances and appropriate facilities on an equal basis.

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[35] South Africa (Republic). 1993. Interim Constitution of the Republic of South Africa 200 of 1993. Pretoria: Government Printers.

Teacher's Duty of Care

The basis of the South African teacher's duty of care lies *inter alia* in his common law role of *in loco parentis*. With regard to the fulfilment of his duty of care, a teacher is to contribute to an environment and atmosphere of safety within which education can take place.[36]

Earlier Years

As early as 1925, the *South African Appeal Court in Transvaal Provincial Administration v. Coley*[37] set the standard of care applicable to the teacher's duty of care role as being that of a prudent father. Judge of Appeal De Villiers wrote:

> The care which is exacted by our law is that which the *diligens paterfamilias*[38] [lit.: the prudent, diligent, careful, circumspect head of a family] would have taken in the circumstances. It is not the care which the man takes in his own affairs, nor that which the ordinary or average man would take. It is higher than that. The law sets up a standard to which everybody has to conform, that degree of care which would be observed by a careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty. [The author's own insertion].

In the supreme court case of *Broom and Another v. The Administrator,* Natal of 1966 Judge Harcourt referred to English law as being the root for connecting the teacher's duty of care to his *in loco parentis* position:

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[36] Oosthuizen, I.J. 1994. Die skopus en konteks van die in loco parentis-posisie van die onderwyser. South African Journal for Education, 14(4):p.209.

[37] South African Law Reports: Transvaal Provincial Administration v. Coley. 1925 24 (A).

[38] Hiemstra, V.G. & Gonin, H.L. 1986. Trilingual Legal Dictionary. Cape Town : Juta & Co; p.186.

These and other English cases establish that in that system of law the test which has become firmly established to determine whether or not conduct is negligent is that the foresight and care required of a person *in loco parentis*, such as a schoolmaster supervising and controlling children is that of a reasonably careful parent in relation to his own children.[39]

More Recently

In more recent years, this principle was confirmed by some of the South African (post) constitutional statutory measures:

Section 28 of the Constitution of South Africa (1996) specifies *inter alia* that every child (a person under the age of 18 years) has the right:

> (1)(d) to be protected from maltreatment, neglect, abuse or degradation
>
> (2) A child's best interests are of paramount importance in every matter concerning the child (i.e. the physical and mental safety at school) (author's insertion).[40]

Section 3(4) of the National Education Policy Act of 1996 determines that the national Minister of Education may determine national policy which ensures that no student will be subjected to psychological and/ or physical abuse at any educational institution.[41]

Section 5(3)(c) of the South African Schools Act of 1996 determines that no learner may be refused admission to a public school where his/ her parent(s) "has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner."[42]

The most recent South African court of appeal case with regard to the teacher's duty of care is *Minister of Education and Culture (House of Delegates) v. Azel* and *Another*.[43] While Mr. Azel was still a minor and a student of the Laudium Secondary School in Pretoria, he went on a school excursion. His Biology teacher, Mrs. Jhinabhai, took some of the pupils in her class on the excursion. As the minibus providing transport could not accommodate all of them, Mrs. Jhinabhai used her private car. Azel was one of the two pupils who accompanied her. On their way to their destination, Mrs Jhinabhai lost control of her car with the result that it left the road and collided with a tree causing Azel's injuries. It proved to be common cause that Mrs. Jhinabhai drove negligently by failing to take reasonable precautions necessary to avoid the accident.

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[39] South African Law Reports: Broom and Another v. The Administrator, Natal 1966 3 SA 505 (D).

[40] South Africa (Republic). 1996. Constitution of the Republic of South Africa. Pretoria: Government Printers.

[41] South Africa (Republic). 1996. National Education Policy Act 27 of 1996. Pretoria: Government Printers.

[42] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

[43] South African Law Reports: Minister of Education and Culture (House of Delegates) v. Azel and Another 1995(1) SA 30(A).

Before the excursion Mrs. Azel signed a letter of indemnity against liability which read:

> I fully understand and accept that all tours and excursions shall be undertaken at my child's own risk and I undertake, on behalf of myself, my executors and my child aforesaid to indemnify, hold harmless and absolve the department, the principal and his staff against and from any or all claims whatsoever that may arise in connection with any loss of or damage to the property or injury to the person of my child aforesaid in the course of any such tour or excursion, in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child.

On gaining majority, Azel instituted action against the Minister of Education and Culture (House of Delegates) for the payment of damages to the amount of R765,252 (at present day exchange rate it would constitute about $127,542 in American funds).

The appeal court held that the exemption contained in the indemnity unambiguously absolved the appellant from liability in the circumstances of the case as it was the interpretation of the additional phrase that was decisive on appeal. This interpretation was an integral part of the preceding exemption and qualified it so that the indemnity could not avail the appellant as a defense to the claim: the words "in the knowledge that" in the additional phrase were the equivalent of "on the understanding that" or "provided that," and, thus, introduced a precondition from the undertaking to grant the exemption from liability and therefore a precondition for its operation. The court of appeal accordingly confirmed the decision of the lower court.

Corporal Punishment

A teacher's commission to maintain order and discipline (i.e. to inflict corporal punishment) was based on his role as an *in loco parentis* person. The South African Constitutional era altered it drastically.

The Pre-Constitutional Period

As early as 1917, in *Rex v. Liebenberg*, Judge Ward referred to the *in loco parentis* role of the teacher and said that: "[t]he common law permits a parent to administer moderate chastisement to his child and, when the child is sent to school, he is presumed to delegate this power to the schoolmaster."[44]

In 1925, in *Tiffen v. Cilliers, the Supreme Court of the Orange Free State* held that: "Corporal punishment can and may be lawfully inflicted on pupils and neither parents nor pupils are entitled to object to its infliction in the absence of legal grounds of objection."[45]

In 1941, in *Rex v. Jacobs, the Supreme Court* held that a principal had discretionary powers to make decisions regarding the administering of corporal punishment.[46] The discretion was of quasi-judicial nature that allowed the principal, provided that he acted in good faith, to decide whether corporal punishment should be inflicted on a student, and, if so, how many cuts the student should get.

The Post-Constitutional Period

The interim Constitution was promulgated in 1993. The relevant sections from the interim Constitution with regard to corporal punishment were sections 10 and 11:[47]

> Human dignity
>
> 10. Every person shall have the right to respect for and protection of his or her dignity.
>
> Freedom and security of the person
>
> 11. (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
>
> (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

In 1995, in *State v. Williams, the Constitutional Court* had to determine whether the infliction of corporal punishment as a sentence on a juvenile was constitutional. Judge Langa found that juvenile whipping was unconstitutional since section 10 guarantees to every person "the right for and protection of his dignity."[48] The proposition advanced was that the circumstances under which juvenile whipping is administered,

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[44] Orange Free State Law Reports. 1917. Rex v. Liebenberg. OPD 67.

[45] Orange Free State Law Reports. 1925. Tiffen v. Cilliers. OPD 30.

[46] Orange Free State Law Reports. 1941. Rex v. Jacobs. OPD 9.

[47] South Africa (Republic). 1993. Interim Constitution of the Republic of South Africa 200 of 1993. Pretoria: Government Printers.

[48] South African Law Reports: State v. Williams and Others. 1995 SA 341 (CC).

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including the fact that it involves the intentional infliction of physical pain on the juvenile by a stranger, are incompatible with respect for and the protection of the dignity of the person being punished.

Referring to international case law and provisions from the European Convention for the Protection of Human Rights and Fundamental Rights, he came to the conclusion that corporal punishment should be regarded as inconsistent with the aforesaid section 11 of the interim Constitution.

Although Williams had a bearing on juvenile whipping as a sentence, it was generally felt that it had a strong influence on educational legislation which was soon to follow:

> Section 4(n) of the National Education Policy Act (SA: 1996(a)) commissioned the National Minister of Education to determine national policy for "the control and discipline of students at education institutions: provided that no person shall administer corporal punishment, or subject a student to psychological abuse at any education institution;[49]
> Section 10 of the South African Schools Act (SA:1996(b)) followed suit by also prohibiting corporal punishment:[50]
> 10(1) No person may administer corporal punishment at a school to a learner.
> (2) Any person who contravenes subsection 10 (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

The provisions regarding Human Dignity and the Freedom and Security of Person in the final Constitution of South Africa (SA 1996) were taken up in sections 10 and 12 and remained virtually the same as far as the relevant specifications with respect to corporal punishment are concerned.

Conclusion

If the growth of Educational Law in South Africa is compared with the development in countries such as the United States it might be true to say that Educational Law made a late start. This late start was affected by the dramatic changes resulting form political renewal and the introduction of the Constitutional era in South Africa.

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[49] South Africa (Republic). 1996. National Education Policy Act 27 of 1996. Pretoria: Government Printers.

[50] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

At present it is a well established discipline at various tertiary institutions in South Africa. As far as organized Educational Law is concerned, it is well cared for by the South African Educational Law and Policy Association (SAELPA) and the Centre for Educational Law and Policy (CELP).

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